

**CITE THIS VOLUME
4 CAL. UNREP.**

California. Supreme Court
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CALIFORNIA UNREPORTED CASES

BEING THOSE

DECISIONS DETERMINED IN THE SUPREME COURT AND
THE DISTRICT COURTS OF APPEAL OF THE
STATE OF CALIFORNIA

BUT NOT

OFFICIALLY REPORTED

WITH

ANNOTATIONS

SHOWING THEIR PRESENT VALUE AS AUTHORITY

REPORTED AND EDITED BY

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VOLUME 4

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CASES DETERMINED
IN THE
SUPREME COURT OF CALIFORNIA
BUT NOT
OFFICIALLY REPORTED.

VALLEY LUMBER COMPANY v. WOOD.

No. 18,056; June 3, 1893.

33 Pac. 343.

Counterclaim.—In an Action for Goods Sold and Delivered, the allegation of a counterclaim of \$1,700 for 171,000 bricks sold and delivered by defendant to plaintiff, no part of which has been paid, states sufficient facts to support a judgment for defendant.

Counterclaim.—In an Action to Which Defendant Pleaded a counterclaim for brick alleged to have been delivered to plaintiff corporation, the evidence was undisputed that the bricks mentioned in the answer were to be used in a certain building in which plaintiff had no interest. The contractor for the erection of the building testified that he ordered the bricks from defendant, while defendant testified that they were ordered by a member of an agency who were managing agents for plaintiff corporation, but there was no evidence to connect plaintiff with this transaction through the agency. Held, that the evidence did not justify a verdict for defendant on the counterclaim.

APPEAL from Superior Court, Fresno County; M. K. Harris, Judge.

Action by the Valley Lumber Company, a corporation, against R. G. Wood. Defendant had judgment on a counterclaim, and plaintiff appeals. Reversed.

L. L. Cory for appellant; Hinds & Merriman and F. H. Short for respondent.

VANCLIEF, C.—Action to recover \$586.39 for goods sold and delivered. The complaint is in two counts—the first for \$503.19 for goods sold and delivered by plaintiff; and the second for \$83.20 on account of goods sold and delivered to defendant by Prescott & Pierce, copartners, assigned to plaintiff. The defendant made no denial of the first count, but denied that he was indebted to Prescott & Pierce in any sum exceeding \$81.20; and further denied the alleged assignment by Prescott & Pierce to plaintiff. In addition to these denials, the defendant alleged, in substance, the following affirmative matters: (1) A counterclaim of \$1,710 to the first count, for 171,000 bricks alleged to have been sold and delivered by defendant to the plaintiff in May, 1889, no part of which has been paid. (2) A counterclaim to the second count for 171,000 bricks, of the value of \$1,710, alleged to have been sold and delivered by defendant to Prescott & Pierce in May, 1889, no part of which has been paid. (3) “And for a third and separate answer and defense to both alleged causes of action, and by way of counterclaim and cross-complaint, defendant alleges” that in May, 1889, he sold and delivered to Prescott & Pierce 171,000 bricks, of the value of \$1,710; and that in making the purchase of said bricks Prescott & Pierce were acting as agents of plaintiff, and made the purchase for the benefit of plaintiff, as defendant has since been informed and believes, though he had no knowledge of such agency at the time of the transaction. He therefore avers that Prescott & Pierce are necessary parties to the action, and prays for judgment against the plaintiff for \$1,710 and such further relief, etc. (4) “For a further and separate answer and defense, and by way of counterclaim and for a cross-complaint herein, defendant alleges” that in May, 1889, he sold, delivered, and furnished to Prescott & Pierce 171,000 bricks, of the value of \$1,710, at their instance and request; and further avers that he is informed and believes the plaintiff was jointly interested in the transaction by which said bricks were sold as aforesaid, and interested in the profits of such transaction, if any there were; but at the time of the transaction defendant did not know that plaintiff was interested with Prescott & Pierce in the purchase; “wherefore defendant prays that said Prescott & Pierce be made parties hereto, and be duly cited to appear and to answer the cross-

complaint herein"; and further prays for a joint judgment against Prescott & Pierce and the plaintiff for the sum of \$1,710 and costs, and such further relief, etc. There was no demurrer to any of these answers, and no motion to strike out, nor to require defendant to elect upon which of the inconsistent answers he would rely at the trial. The plaintiff answered the so-called "cross-complaints" by denying all the allegations thereof. All the pleadings were verified. The cause was tried by a jury, whose verdict was in favor of the defendant for the sum of \$1,123.61, upon which judgment was rendered against the plaintiff. The plaintiff appeals from the judgment and from an order denying its motion for a new trial.

1. Appellant contends that none of the affirmative answers of the defendant states facts sufficient to constitute either a counterclaim or cross-complaint, and that the judgment should be reversed for this reason. While it is clear that the facts stated do not constitute a cross-complaint, I think the first plea states the substance of a valid counterclaim to the first count of the complaint, which, if proved, would have supported the verdict, since it exceeds the amount of both counts of the complaint by \$1,123.61, which is just equal to the verdict. The record shows no ground upon which the apparent inconsistencies of the defenses can be considered here: *Buhne v. Corbett*, 43 Cal. 264; *Uridias v. Morrell*, 25 Cal. 31.

It is further contended that the evidence does not justify the verdict, in that it does not tend to prove that defendant ever sold or delivered any bricks to the plaintiff through the agency of Prescott & Pierce or otherwise; and it seems clear that this point should be sustained. It appears without controversy that all the bricks mentioned in the answers were to be used in the erection of a building known as the "Chamber of Commerce Building," owned by a stock company, in which the plaintiff was not interested; that one Joe Smith was the contractor for the erection of the building; that the bricks were delivered by defendant at the site of that building, and were used by the contractor in the erection of the building; that the company owning the building (the Chamber of Commerce Association) failed before the building was completed, having mortgaged the building for more than its value; that the work on the building was abandoned by the contractor;

and that the building has not been completed. There is also undisputed testimony that the filing of liens by the contractor and materialmen would have been useless, because of the prior mortgage for more than the value of the property. It appears that Prescott & Pierce were copartners, principally engaged in dealing in grain, and that they were also managing agents for the plaintiff corporation, which had furnished lumber and lime used in the construction of the building of the value of \$1,500 to \$1,600, for which it had not been paid. It also appears that the 171,000 bricks mentioned in the different answers were the same that were used in the Chamber of Commerce Building, and that defendant delivered no other bricks. The contractor, Joe Smith, testified that he ordered the bricks from defendant; but the defendant flatly contradicted this, and testified that Prescott alone ordered the bricks. Prescott testified positively that he neither individually nor as agent for the plaintiff ever ordered the bricks, or promised to pay for them; and there is no testimony or circumstance to connect the plaintiff with the transaction through any agency. The testimony of the defendant tended to prove only that he sold the bricks to Prescott, or to Prescott & Pierce. I think the order and judgment should be reversed, and a new trial granted.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial granted.

HAMLIN v. PHILIPS.

No. 15,040; June 6, 1893.

33 Pac. 331.

Trust—Review on Appeal.—Where, in an Action to Establish a trust, the findings controvert plaintiff's claims at all points, and there is evidence to support the findings, a decree for defendant will not be set aside except on the most satisfactory and convincing grounds.

APPEAL from Superior Court, Sonoma County; R. F. Crawford, Judge.

Action by Catherine Hamlin against Nancy M. Philips, and Nancy M. Philips as administratrix of the estate of P. J. Philips, deceased, to establish a trust in certain real estate. From a judgment for defendant and from an order denying her motion for a new trial, plaintiff appeals. Affirmed.

R. P. Clement, A. G. Burnett and T. J. Geary for appellant; J. W. Rose and Barham & Bolton for respondent.

GAROUTTE, J.—This action was brought to obtain a judgment and decree that the land described in the complaint, the title to which stood in the name of P. J. Philips at the time of his death, and also certain personal property, was the property of the plaintiff, and that P. J. Philips, deceased, was her trustee, and that his estate had no right or interest in said property, or any part thereof. Judgment went for defendant, and this appeal is taken from the judgment and order denying a motion for a new trial. The findings are full and complete. They controvert the claims of the plaintiff at all points, and warrant the judgment rendered. It is now insisted that the evidence does not support the findings. We have examined with great care the record containing a detailed statement of the evidence given at the trial, and find ample there to justify the findings of the court. The plaintiff is a sister of Philips, deceased. She was about seventy-seven years of age at the date of the trial, and was the principal witness in the case. She was a woman of means, and advanced money to her brother for various purposes. The property involved in this litigation was purchased with this money, and the title taken in the name of Philips. The administratrix of the estate now insists that the money was a loan, and plaintiff claims that it was invested for her benefit, and that the title to the property purchased was held by Philips in trust for her. Plaintiff's testimony is self-contradictory in many respects, apparently attributable to weakness of memory, but sufficient is found therein to support defendant's theory of the case, that the money was advanced to plaintiff's brother as a loan.

It is not necessary to enter into a review of the evidence in detail for the purpose of indicating in this opinion wherein it supports the findings. Upon a careful examination of the record, the fair import of all the evidence, taken together, is in line with the findings and judgment of the court. The arguments of the learned counsel for appellant as to the improbability of these advances being made by her as loans, and as to the inferences of fact that may be drawn from the rather peculiar circumstances of the case, might well have been addressed to the trial court before final judgment rendered, and also upon the hearing of the motion for a new trial. Such arguments necessarily possess much greater force and weight when addressed to the court of original jurisdiction than when directed to the appellate tribunal. The case is essentially one wherein it devolved upon the trial court to carefully sift and weigh the evidence, and where this court would not be justified in setting aside a decree made in the exercise of that power and that duty, unless upon the most satisfactory and convincing grounds. For these reasons, it is ordered that the judgment and order be affirmed.

We concur: Harrison, J.; Paterson, J.

DESMOND v. FAUS et al.

No. 14,116; June 6, 1893.

33 Pac. 457.

New Trial—Extending Time for Serving Statement.—The fact that counsel consented to the first extension of time in which to serve the statement on a motion for a new trial did not authorize the court to further extend the time thirty days, under the code, exclusive of the first extension.

New Trial.—An Order Denying a Motion for a New Trial is properly made on the hearing of a motion to dismiss the same for failure to prosecute with due diligence.

APPEAL from Superior Court, City and County of San Francisco; Walter H. Levy, Judge.

Action for personal injuries by James Desmond against Otto Faus and others. There was a verdict for defendants, and from an order denying a new trial plaintiff appeals. Affirmed.

James F. Smith for appellant; J. F. Castlehun for respondents.

TEMPLE, C.—This action was brought to recover damages for personal injuries, and the verdict was for the defendants. Plaintiff appeals from an order refusing a new trial.

Respondents contend that the order must be affirmed, without considering the alleged errors, because plaintiff lost his right to move for a new trial by his failure to prepare and serve his proposed statement in time. Notice of intention to move for a new trial was given April 7, 1888. The proposed statement was served May 28th—forty-nine days after the notice of intention was given. The adverse party did not consent to any extension of the time. Sundry orders extending the time were made by the court, amounting to forty-five days in all. But the court could only grant extensions amounting to thirty days, which, added to the ten days given by the code, make forty days. The statement was therefore served nine days too late. No excuse is attempted for this delay, but it seems to be contended that the court granted the first extension of fifteen days with the consent of the attorney for defendants. His record does not sustain this contention, but if it did it would not satisfy the exigencies of plaintiff's case. Such consent is itself a refusal to stipulate, and amounts to referring counsel to the court for his relief. It falls far short of a consent that the court may extend the time more than thirty days.

December 14, 1888, a motion was noticed to dismiss the motion for a new trial on the ground that plaintiff had not prosecuted it with due diligence. Amendments to the proposed statements were served July 3, 1888. It does not appear whether anything was done to effect a settlement prior to October, when plaintiff was ordered to engross the statement. December 8, 1888, defendants gave notice of a motion to dismiss for want of due diligence in prosecuting the motion. Yet the statement was not engrossed until March 14, 1889, and was certified and settled March 15, 1889, and not

filed until March 30th. I find no evidence in the record that the motion for a new trial was ever brought on, or submitted for decision, except by the motion to dismiss. The order appealed from is as follows: "In this action the defendants' motion to dismiss plaintiff's motion for a new trial having been heretofore submitted to this court for consideration and decision, now, the court having fully considered the same, it is ordered that the motion for a new trial herein be, and the same is hereby, denied." By this order it would seem that the motion was granted, or rather that the motion for a new trial was denied, because of the failure to prosecute with due diligence. This practice has been approved by this court in several cases: *Quivey v. Gambert*, 32 Cal. 309; *Calderwood v. Peyser*, 42 Cal. 110; *McDonald v. McConkey*, 57 Cal. 325; *Bunnell v. Stockton*, 83 Cal. 319, 23 Pac. 301. Whether the first objection, that the proposed statement was not served in time, is properly included in the motion to dismiss for failure to prosecute with due diligence, may be questioned. No point is made on this, however, and no injury is done. By such failure, plaintiff's motion was lost. The objection to the failure to serve in time was never waived by respondents, but was expressly reserved in all subsequent steps in the proceeding. The order, I think, should be affirmed.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is affirmed.

FISHER v. HOPKINS.

No. 13,171; June 8, 1893.

33 Pac. 438.

Appeal—Sufficiency of Evidence.—Where, on appeal, the evidence is found sufficient to justify the findings of the trial court, the judgment of that court will not be disturbed.

APPEAL from Superior Court, City and County of San Francisco; James G. Maguire, Judge.

Action by Ann Fisher against Peter Hopkins for the conversion of certain household furniture. Judgment for plaintiff. Defendant appeals. Affirmed.

James F. Smith for appellant; T. J. Crowley and P. J. Morgan for respondent.

VANCLIEF, C.—It is alleged in the complaint that while plaintiff was the owner, and entitled to the possession, of certain personal property (household furniture), the defendant wrongfully converted the same to his own use, to the damage of the plaintiff in the sum of \$2,000. The defendant denies the alleged title of the plaintiff, and justifies the taking and alleged conversion of the property under writs of attachment and execution against one Minerva Button, issued to him as sheriff, alleging that the furniture in question was the property of Minerva Button. The case was tried by the court, and judgment rendered in favor of the plaintiff for \$951.95 and costs. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The only grounds upon which a reversal of the order and judgment is asked are that the findings of fact are not justified by the evidence. The plaintiff claims to derive her title to the property from Minerva Button, through an absolute bill of sale and delivery of possession from Mrs. Button to Josiah Lean, Robert Peoples and Lydia Peoples, executed prior to the issuance of the writs by virtue of which the defendant took and sold the property, and a bill of sale from Lean and Peoples to the plaintiff. The findings excepted to relate principally to the considerations paid for the bills of sale, and to the questions whether there was an actual and immediate delivery of the property, followed by a continuous change of possession. After a careful examination of the two hundred pages of conflicting evidence contained in the statement on motion for a new trial, I think, under the well-settled rule in such cases, that the evidence is sufficient to justify all the findings, and that the judgment and order should be affirmed.

We concur: Haynes, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

WEINBURG v. SOMPS.

No. 14,748; June 9, 1893.

33 Pac. 341.

Trial.—The Mere Failure to Instruct the Jury on a point cannot be assigned as a refusal so to do, where there was no request for such instruction.

Trial.—Where a Witness is Called in Rebuttal, and then fully cross-examined as to a matter to which an objection was sustained when witness was first called, the error, if any, in sustaining the objection, is cured.

New Trial.—The Application for a New Trial because of the newly discovered evidence of three witnesses showed that the materiality of their testimony appeared from the testimony of plaintiff, who testified in the morning of the first day of the trial, and that the trial closed at 1:30 on the second day; that a messenger was sent for one of the witnesses on the morning of the second day, but witness was away from home. No subpoena was issued for any of these witnesses, and no application was made for time to procure the attendance. Held, that the application failed to show reasonable diligence.

Trial—Chance Verdict.—Where the Jury Agree that each shall write out the sum he thinks plaintiff is entitled to recover, and then divide the aggregate of such sums by twelve, and that the quotient shall be the amount of the verdict, such verdict is determined by chance, within the meaning of Code of Civil Procedure, section 657, subdivision 2, providing that such misconduct of the jury may be shown by the affidavit of any of the jurors.¹

APPEAL from Superior Court, City and County of San Francisco; Walter H. Levy, Judge.

Action for malicious prosecution by Moritz Weinburg against P. G. Soms. Plaintiff had judgment, and from an order denying a new trial, defendant appeals. Reversed.

Gordon & Young for appellant; J. G. Maguire and H. K. McJunkin for respondent.

¹ Cited and followed in Rockwell v. Italian-Swiss Colony, 10 Cal. App. 637, 103 Pac. 164, where it is shown that the right, under the statute, to have a new trial ordered on the ground of newly discovered evidence does not accrue to one who, by the exercise of reasonable diligence, could have produced the evidence at the trial.

VANCLIEF, C.—Action for malicious prosecution of the plaintiff on a charge of having bought and received stolen property, for which he was tried in the police court and discharged. The jury returned a verdict for plaintiff, assessing his damages at \$3,333, for which sum judgment was rendered. The defendant brings this appeal from an order denying his motion for a new trial.

1. Counsel for appellant contend that the court erred in its instruction to the jury as to what constitutes probable cause for the criminal prosecution complained of. The exception upon which this point rests was taken at the close of the instructions given, and was in the following language: "I desire to except . . . to your instruction to the jury as to what constitutes probable cause, and your refusal to instruct the jury that it is for the court to determine what probable cause is, and not for the jury." Waiving the indefiniteness of the exception, it is a sufficient answer to this point that the court did instruct the jury as to what would constitute probable cause substantially as requested by defendant's counsel, and very nearly in the same language. Besides, the court was not requested to instruct that it was for the court, and not the jury, to determine what is probable cause; and consequently did not refuse so to instruct.

2. It is claimed that the evidence does not justify the finding of malice on the part of the defendant in causing plaintiff to be arrested, for the reason that the defendant acted on the advice of a police officer. But the evidence tends to prove that defendant did not state to that officer all the material facts within his knowledge bearing upon the question of malice, and that the officer did not know all such facts. It is, therefore, unnecessary to decide whether the advice of the police officer would have shielded the defendant from the charge of malice under any circumstances.

3. It is claimed that the court erred in sustaining an objection to a question asked plaintiff by defendant's counsel on cross-examination. But afterward, when the plaintiff was called in rebuttal, he was fully examined by defendant's counsel as to the same matter in relation to which the objection had been sustained. This cured the alleged error, if it was error.

4. One of the grounds for a new trial was that of newly discovered evidence, viz., the testimony of three witnesses, all residents of the city of San Francisco (the place of trial), whose testimony, as appears by their affidavits, will contradict a part of the testimony of the plaintiff on his own behalf as to special damages to his business. The proposed new testimony contradicts very little of the material testimony of the plaintiff, and probably would not have effected a change of the verdict. But, however this may be, I think it is not made to appear that defendant could not, with reasonable diligence, have discovered and produced at the trial the alleged new evidence. It appears that the trial was commenced on the morning of March 24th, and closed the next day about 1:30 P. M.; that plaintiff was the first witness examined, and that he gave the testimony sought to be contradicted before noon of the first day of the trial; that such testimony of the plaintiff related solely to his relations, dealings, and conversations with the newly discovered witnesses—Hartzman, Lachman, and Kuhn—who must have known, and very probably remembered, whether plaintiff's testimony as to his relations, dealings, and conversations with them was true or false; that, after the adjournment of the court on March 24th, defendant was advised by his attorney to find out from Hartzman whether plaintiff's statements were true or false. Thereupon defendant instructed one of his employees, Morris Lewin, to find Hartzman, and make inquiries as to the truth of plaintiff's testimony. The affidavit of Lewin states that he was instructed to find Hartzman in the afternoon of March 24th; that about 8 o'clock next morning he found the residence of Hartzman, and then learned that he had gone to Alameda on business, and was not expected to return before evening of that day; that he waited around Hartzman's house several hours, hoping that he might return sooner than expected, but he did not; that he then returned to the courtroom about noon, when he learned that the evidence in the case was closed. He does not state that he had any difficulty in finding Hartzman's house, or that he tried to find it before the morning of March 25th. It does not appear that any effort was made to find either of the other two witnesses Lachman and Kuhn until some four or five days after the trial. No subpoena was issued for any of these witnesses, and no application was

made to the court for time to procure their attendance. Do the affidavits of defendant and Lewin show that the new evidence could not, with reasonable diligence, have been discovered before the close of the trial? I think they do not, since they fail to prove due diligence. That defendant did not know what the new witness would testify is no excuse. He had been notified by plaintiff's testimony that these witnesses knew the truth of the matters as to which plaintiff had testified, and would contradict him if his testimony was false: *People v. Sutton*, 73 Cal. 248, 15 Pac. 86; *Klockenbaum v. Pierson*, 22 Cal. 160; *Stoakes v. Monroe*, 36 Cal. 384. The case of *Kenezleber v. Wahl*, 92 Cal. 202, 28 Pac. 225, cited by respondent's counsel, does not answer their purpose, as that was an appeal from an order granting a new trial. In that case, as in this, the necessity for the newly discovered evidence was first discovered at the trial, but the new witnesses resided one hundred miles from the place of trial. And as to the means of discovering the new evidence the court said: "It is therefore evident that the plaintiff possessed no means by which he could discover the evidence which is alleged to be newly discovered, and that he had no knowledge of the evidence or of the witnesses by whom it could be established until after the trial." Besides, the usual deference was expressly paid to the discretion exercised by the judge who tried the case in granting the new trial.

5. Another ground upon which a new trial is asked is that of misconduct of the jury, in that eleven of the jurors were induced to assent to the verdict by a resort to the determination of chance. This point is supported by the following affidavit of a juror, to which there is no counter-affidavit:

"[Title of Court and Cause.]

"State of California,

City and County of San Francisco—ss.:

"J. P. Larsen, being first duly sworn, says on oath: I am one of the jurors who were impaneled to try the above-entitled action. Said cause came on for trial on the 24th day of March, A. D. 1890, and was submitted to the jury for their verdict on the 25th day of March, A. D. 1890. Eleven of said jurors rendered their verdict in favor of plaintiff for the sum of \$3,333 on the said last-mentioned day. When the

jury retired under the charge of the sheriff to consider their verdict in said case, some of the jurors considered the propriety of giving the sum of \$10,000 damages, and one was in favor of rendering a verdict of \$1 in favor of plaintiff. Being unable to agree as to the amount of their verdict, it was then agreed by and between said jurors that their verdict should be arrived at in the following manner, and that they should be bound by the result, to wit: That each juror should write on a slip of paper the amount to which he thought plaintiff was entitled, and, after doing so, their amounts should be added together and divided by twelve, and the quotient resulting therefrom, whatever the same should be, should be the verdict of said jury. That thereupon each of said jurors other than H. McCabe wrote down on a slip of paper the amount which he thought plaintiff was entitled. Some amounts of which were in excess of \$5,000, the amount demanded by plaintiff. Said amounts were then added together and divided by twelve, the result of said division being the sum of \$3,333, the amount of verdict by said jury. That when the division aforesaid resulted in a quotient of \$3,333, such was taken as their verdict, in pursuance of said prior arrangement to be bound by said result, without further consultation or assent among them.

“J. P. LARSEN.”

“Subscribed and sworn to before me, this 10th day of May,
A. D. 1890.

“H. P. TRICOU,
“Notary Public.”

On the authority of the late case of *Dixon v. Pluns*, decided by the court in bank, and filed May 31, 1893, 98 Cal. 384, 35 Am. St. Rep. 180, 20 L. R. A. 698, 33 Pac. 268, I think this affidavit shows that the verdict was determined by chance, in the sense of the second subdivision of section 657 of the Code of Civil Procedure, and, therefore, that the affidavit of the juror was admissible as evidence of the fact. But, inasmuch as the case of *Dixon v. Pluns*, *supra*, overrules the case of *Turner v. Water Co.*, 25 Cal. 397, on the authority of which respondent's counsel appear to have confidently relied, I think respondent should have an opportunity to file counter-affidavits to that of the juror Larsen, and that

the motion for new trial should be reheard and decided solely upon the alleged ground of misconduct of the jury, and upon such additional affidavits as may be offered by either party. To this end I think the order refusing a new trial should be reversed, the cause remanded, and the lower court instructed to rehear and decide the motion for new trial on the alleged ground of misconduct of the jury alone; and, upon such rehearing, to admit and consider such additional pertinent affidavits as may be filed by either party within twenty days after the filing of the remittitur.

We concur: Belcher, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order refusing a new trial is reversed, the cause remanded, and the lower court instructed to rehear and decide the motion for new trial on the alleged ground of misconduct of the jury alone, and upon such rehearing to admit and consider such additional pertinent affidavits as may be filed by either party within twenty days after the filing of the remittitur.

WHITE v. WHITE.

No. 14,848; June 9, 1893.

33 Pac. 399.

Divorce—Alimony and Costs.—Under a Judgment in a divorce proceeding, requiring “all costs, expenses, and disbursements provided for and contemplated in this decree or judgment” to be paid by the plaintiff exclusively out of his separate property, defendant has no right to include in her cost bills items not taxable as costs.

Divorce—Alimony and Costs.—Motions in a Divorce Proceeding for the payment to defendant of her costs and disbursements, and for permission to plaintiff to mortgage his property in order to pay alimony, counsel fees, and other expenses of the litigation, are addressed to the discretion of the court.¹

¹ Cited in *White v. Costigan*, 134 Cal. 37, 66 Pac. 79, as having affirmed an order under which was executed a mortgage involved in the latter case.

APPEAL from Superior Court, City and County of San Francisco; Eugene Garber, Judge.

Action by George E. White against Frankie White for a divorce. From certain orders in favor of plaintiff, defendant appeals. Affirmed.

Henry E. Highton, H. C. McPike and J. A. Cooper for appellant; Barclay Henly and E. D. Wheeler for respondent.

BELCHER, C.—The transcript in this case presents three appeals, based upon three separate bills of exceptions: the first from an order striking out certain items in two of defendant's bills of costs, the second from an order denying defendant's application for a further allowance for costs and expenses, and the third from an order allowing the plaintiff to mortgage his property. Each of the orders appealed from was made on the twenty-fourth day of June, 1891. In order that there may be a proper understanding of the questions involved in these appeals, a brief history of the case should be stated. The plaintiff commenced the action in December, 1885, to obtain a divorce from the defendant. The defendant answered, denying the charges made against her, and also filed a cross-complaint, in which she stated facts entitling her to a divorce, and prayed that she be granted a divorce from the plaintiff. While the case was pending in the trial court, on application of defendant, an order was made requiring the plaintiff to pay to her sums of money aggregating \$3,850, for costs and expenses, alimony and counsel fees; the item for costs and expenses being \$250. From this order an appeal was taken by the plaintiff to this court, and the order was affirmed in July, 1887: *White v. White*, 73 Cal. 105, 14 Pac. 393. In October and November, 1887, two other orders were made, requiring the plaintiff to pay to defendant the further sums of \$250 and \$518, for costs and expenses. The case was tried in April, 1888, and after it was submitted for decision the court made another order, requiring the plaintiff to pay to defendant the sum of \$1,263.65 for additional costs and expenses. On May 15, 1889, judgment was entered denying a divorce to the plaintiff and granting one to the defendant. From this judgment the plaintiff appealed to this court, and

the judgment was affirmed in October, 1890: 86 Cal. 219, 24 Pac. 996. The plaintiff also appealed from an order denying his motion for a new trial of the case, and that appeal was subsequently dismissed. There were two other appeals from orders relating to attorneys' fees, and the decisions are reported in 86 Cal., at pages 212 and 216, 24 Pac., at pages 1030 and 1031. Afterward, in December, 1890, an order was made requiring the plaintiff to pay to defendant the sum of \$7,500 for attorneys' fees. The plaintiff appealed from this order, and his appeal was dismissed on March 24, 1891: 88 Cal. 429, 26 Pac. 236.

The facts leading up to the present appeals are as follows:

1. Upon the dismissal of plaintiff's appeal from the order denying his motion for a new trial, and within the time allowed by law, defendant served and filed her bill of costs on the appeal, which contained the following item: "Printing respondent's points and authorities, filed February 28, 1891, \$125.00." And again, upon the dismissal of the appeal from the order of December, 1890, and in proper time, defendant served and filed another bill of costs, containing this item: "Printing of defendant's brief on her motion to dismiss, March 5, 1891." Subsequently the plaintiff moved that each of these items be stricken out of the cost bills upon the ground that it "is not a proper item of the same, and that the amount is unreasonable, and excessive." The court granted the motion, and hence the first appeal.

It is admitted by appellant that the items stricken out were not properly taxable costs, but it is claimed that they were necessary expenses in the case, which the plaintiff, by the express provisions of the judgment, was required to pay, and hence that it was error to strike them out of the cost bills. The clause of the judgment referred to is, "that all costs, expenses, and disbursements provided for and contemplated in this decree or judgment be borne and paid by the plaintiff exclusively out of his separate property." There was no error in the rulings complained of. Under the clause of the judgment quoted, the appellant had no right to include in her cost bills items not taxable as costs. If they were necessary expenses, and not already sufficiently provided for,

application should have been made to the court for a further or additional allowance for that purpose.

2. On May 2, 1891, counsel for defendant served notice on the plaintiff that they would move the court for an order requiring the plaintiff to pay to defendant an additional sum of \$2,510, to reimburse and enable her to pay her costs and disbursements from April 20, 1888 (the date of her last allowance for costs), to date; and also for an order requiring the plaintiff to pay her the sum of \$500, to enable her to prosecute the action. The notice stated that the motion would be made upon the ground that the defendant had no means whatever to prosecute the action; that by the terms of the decree entered in the case plaintiff was required to pay all costs and disbursements out of his separate property; and that the sums asked for were reasonable and necessary to bring the litigation to a close. The motion was submitted, and, after consideration, denied by the court, and hence the second appeal.

It is claimed for appellant that this ruling was erroneous because it clearly appeared from the affidavits made by her and read on the hearing that all the items forming the larger sum asked for had been expended by her in connection with the case, and not before allowed, and that they were necessary expenses and disbursements; and also that the smaller sum asked for was necessary to enable her to protect her rights, and have the litigation brought to an end. On the other hand, it is claimed for respondent that the affidavit made by him and read on the hearing effectually controverted all the material facts stated in appellant's affidavits, and fully justified the ruling. We think respondent's claim in this regard must be sustained. The motion was addressed to the discretion of the court, and such an order will not be reversed on appeal, unless it clearly appears that that discretion was abused. After carefully reading the affidavits and other proofs brought up in the record, we are unable to see any such abuse of discretion as would justify a reversal here.

3. In May, 1891, a motion was made that plaintiff be permitted to mortgage his property to the extent of \$8,000, "to enable him to pay alimony and counsel fees and other expenses necessary to the carrying on of the litigation between plaintiff and defendant." The motion was made and con-

tested upon affidavits of the respective parties, and, after consideration, an order was entered permitting the plaintiff to mortgage his property to the extent of \$6,000; and hence the third appeal here presented.

It is claimed that this order was erroneous, because (1) by the decree of divorce all of the community property of the parties was awarded to the defendant; (2) at the date of the making of the order no segregation of the property had taken place, and presumptively all property acquired by the plaintiff subsequent to the date of his marriage was community property; and (3) the mortgage was desired by the plaintiff solely for the purpose of encumbering property involved in the action, and hindering and delaying the defendant from recovering any and all property which, under the decree, she was or might be justly entitled to. The motion was also, in our opinion, addressed to the discretion of the court, and upon the showing made the order cannot be reversed. It is unnecessary to state the facts. See *White v. White*, 97 Cal. 604, 32 Pac. 600, where a similar order was affirmed.

It follows that each of the orders appealed from should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the orders appealed from are affirmed.

MALIC v. FOX et al.

No. 14,883; June 9, 1893.

33 Pac. 441.

Agency—Estoppel of Principal.—A Bond Given to the Owner of a Boat, conditioned to pay for all goods delivered to F., as steward of the boat, was executed by the sureties' bookkeeper without authority. In an action thereon by one who had furnished goods to F., it appeared that the bond was executed June 15th; that plaintiff had commenced furnishing goods June 1st, on F. agreeing to pay on the 15th of each month, and had furnished goods to the value of

\$100 before the bond was executed; that on June 30th, when \$237 was due, and F. refused to pay, plaintiff declined to furnish more goods but afterward, when F. showed him the bond, he continued to let F. have goods, but made no inquiry of the sureties as to the genuineness of the bond until after the goods sought to be recovered for were furnished. Held, that plaintiff did not deliver the goods to F. relying on the bond, "in good faith, and without ordinary negligence," within the meaning of Civil Code, section 2334, providing that only in such case is "a principal bound by the acts of his agent under a merely ostensible authority."

APPEAL from Superior Court, City and County of San Francisco; F. W. Lawler, Judge.

Action by Charles M. Malic against C. G. Fox, W. F. Witzemann, and John J. Staiger. Plaintiff had judgment, from which, and an order denying a new trial, defendants Witzemann and Staiger appeal. Reversed.

Henry N. Clement for appellants; W. H. Barrows for respondent.

VANCLIEF, C.—Action to recover from the defendant, Fox, and his guarantors, Witzemann & Staiger, copartners, the sum of \$431.29, for goods sold and delivered to Fox by plaintiff's assignor, one H. A. Smith, who did business under the name of "Smith's Cash Store." The action is founded upon a written guaranty of Witzemann & Staiger to the San Francisco and North Pacific Railroad Company, a corporation, which owned and navigated the steamer "James M. Donahue," in connection with its road, to transport passengers across the bay of San Francisco, given under the following circumstances: In the latter part of May, 1889, Fox applied to the railroad company for the position of steward of the steamer "James M. Donahue," with the privilege of keeping a restaurant thereon for passengers and employees, and was informed by the agent of the company (H. C. Whiting) that he could be appointed to the position only on the condition that he would give a bond with satisfactory sureties that he would pay all bills contracted by him for goods and supplies for said restaurant. Upon his promise to give the required bond or guaranty, Fox was appointed to and took the position

June 1, 1889, but did not give the bond or guaranty until June 15, 1889, when he gave the following instrument:

"We, the undersigned, do hereby severally and jointly guaranty the full and complete payment of all bills, dues, and claims arising from the purchase of goods, wares, and merchandise by C. G. Fox, by himself, or order, to be used on or for the steamer 'James M. Donahue,' for boarding passengers or employees of the San Francisco and North Pacific Railroad Company; and we severally agree to pay all bills contracted by said Fox or his agent for goods, wares, and merchandise delivered on the steamer 'James M. Donahue,' to be used by him or others as aforesaid, upon presentation to us, or either of us; and we further agree and guaranty that the said steamer 'James M. Donahue,' and the said San Francisco and North Pacific Railroad Company, owners thereof, shall be forever held harmless by reason of any purchase or contracts made by said Fox or his agents for the purposes before named. In case said Fox shall neglect or refuse to pay any or all the bills so contracted, we hereby agree severally to pay the said bills promptly upon presentation, according to the terms of said purchase.

"Witness our hands, this 15th day of June, A. D. 1889.

"WITZEMANN & STAIGER, H.,

"417 East street.

"Witness: W. B. HAYWARD."

The defendants, Witzemann & Staiger, denied all the material allegations of the complaint, including the allegation that they executed the guaranty. But the court found for plaintiff, and rendered judgment accordingly for the full sum demanded. Witzemann & Staiger appeal from the judgment, and from an order denying their motion for a new trial.

Counsel for appellants contend that the finding that Witzemann & Staiger executed the guaranty is not justified by the evidence. The undisputed evidence shows that the guaranty was signed and delivered to Fox by W. B. Hayward, the bookkeeper of Witzemann & Staiger, in their absence, without their knowledge, and without authority in writing, or any express authority whatever. It is claimed by respondent, however, that, by their acquiescence, Witzemann & Staiger impliedly ratified the execution of the instrument by Hayward; and whether he did so, as to plaintiff's assignor, Smith,

is the principal question. "It is the general rule that the act of ratification must be of the same nature as that which would be required for conferring the authority in the first instance." If written authority is required by the statute of frauds, the ratification must be in writing (Mechem on Agency, sec. 136); otherwise, the statute of frauds may be evaded. And the only cases constituting exceptions to this general rule (if even they may be called exceptions) are those in which, although the assumed agent had no original authority, the alleged principal is estopped from denying such authority by reason of his acquiescence, acts, or words indicating ratification, upon which others have relied and acted in good faith and with ordinary care. These are causes of implied or ostensible ratification, to which the principle of estoppel in pais is applicable on the same grounds as to cases of original ostensible authority. In both these classes of cases the effect of the estoppel is equivalent to conclusive proof of original authority (Mechem on Agency, sec. 107); and the authority thus established by an ostensible ratification is an ostensible authority in the sense of section 2334 of the Civil Code, which is as follows: "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without ordinary negligence, incurred a liability, or parted with value, upon the faith thereof." Conceding that the conduct or acquiescence of Witzemann & Staiger was such as to justify a finding of the ostensible authority of Hayward to execute the guaranty (which is doubtful), did Smith—plaintiff's assignor—part with his goods, relying in good faith upon such authority, and without ordinary negligence on his part? Smith commenced selling to Fox the goods sued for on June 1st, and before the execution of the guaranty had sold him goods to the value of over \$100. Smith and his clerk, Murray, testified that credit for these goods was given because they had been informed that Fox could not take his position of steward without having given a bond to the railroad company "for the faithful performance of his duties." The agreement with Fox was that he should pay Smith on the 15th of each month. On the last day of June the bill, then amounting to \$237, was presented to Fox, who failed to pay it. Smith then refused him further credit, and presented his bill to the rail-

road company, whose agent told him that "Fox was under bonds to pay the bill himself, and they didn't wish to have anything to do with it," but if he would get an order from Fox they would pay the June bill. On July 3d Smith asked Fox for an order on the railroad company, but he indignantly refused to give it, saying he would pay his bills on July 15th, or that his bondsmen would. He then showed Smith a copy of the bond he had given the railroad company. As to this Smith testified: "That was on the 3d day of July, I believe. I had refused to give him (Fox) any more goods at that time. On the strength of that bond I continued giving him goods until the 15th of July." On July 15th, for the first time, Smith called on Witzemann & Staiger, at their place of business, to inquire whether they were responsible for Fox's bills. Of this he testified: "I saw Mr. Staiger. . . . Introduced myself to him. Told him who I was. . . . Told him I was supplying goods to a man by the name of Fox, on the steamer 'Donahue.' Asked him if it was all right.—whether he would pay the bill when it became due. . . . I gave him to understand that I would rely upon that bond. I said to him . . . that I considered the matter safe as long as they were on the bond, and that was all I wanted to know—if Fox was short, that they would make it good. He made no response, but he was passing from the street at the time. He shook his head in an affirmative manner, although he made no response." It appears that Fox absconded on that day (July 15th), and that Smith sold him no goods after July 13th. On cross-examination, Smith said: "I never went to see Staiger or Witzemann . . . at any time prior to July 15th. I first went to see the railroad company on the 3d of June. . . . I did not ask to see the bond at the railroad company's. . . . He (Fox) showed me the bond, and I told him all right; go ahead; that it was a good bond, provided it was genuine. . . . The one I saw was a typewritten copy, with written signatures, with the letter 'H': 'Witzemann & Staiger. H.' . . . I had seen the signature of the firm, perhaps. Couldn't say that I recognized it. I should suppose, from the letter 'H,' that it was not signed by the firm. The reason I did not go and see Staiger when I saw that the bond was not signed by the firm was that I was very busy, and hadn't time to go at once. I should have done so, of course,

but I delayed from time to time, thinking that, as long as I got there (at the railroad office) before he (Fox) drew any part of his money, that he couldn't get it, and that I was safe. . . . I accepted his assurances that the bond was genuine for the time being, excepting, however, that before the money was paid over, during the next month, I would see for myself. I had never been accustomed to dealing with this class of bonds before. . . . I think it is a little out of the regular course for this company to do this sort of business. It was a new arrangement with them, perhaps." Upon re-examination he said: "I had seen nothing about the bond that aroused my suspicion in regard to it. I simply wished to go and see Witzemann & Staiger to confirm its genuineness. . . . I never talked with Mr. Hayward about the bond previous to July 15th."

Martin Murray, who, to say the least, seems to have been somewhat reckless in his statements, testified that he was employed in Smith's Cash Store during the months of June and July, and knew when Fox commenced to buy goods from that store for his restaurant on the steamer "Donahue"; that about a week after he commenced buying, Fox "brought in a copy [of the bond] into the store [it was not signed until a week later], and, knowing the man was devoid of veracity, I didn't take any interest in his statement, and I advised Mr. Smith to go and see Mr. Whiting; and I, in the meantime, consulted with the members of the Ocean Market [Witzemann & Staiger]. I went down after he had purchased some stores. . . . We took all precautions, both myself and Mr. Smith, as I told Mr. Smith he was dishonest. . . . Mr. Smith saw Mr. Whiting, and I saw Mr. Staiger. 'Well,' I says, 'Mr. Staiger, I understand,' says I, 'that you are on the bonds of Mr. Fox.' He says, 'Yes.' Says I, 'Well, now,' says I, 'what am I to understand by that bond?' 'Well,' he says, 'we have given security for all the goods delivered upon that boat in the steward's department.' . . . I told Mr. Smith exactly the words Mr. Staiger told me, and, as I said before, we took every precaution. . . . We acted throughout with the understanding that Mr. Staiger was on the bond, and had also seen copies of it, . . . and it was with that understanding that we sold the goods to Mr. Fox, as we did not consider him responsible. . . . I know he owes me a hundred dollars from

another time. I know he came here from Australia. He left his wife there, and he has a very bad record." Being asked when he had the conversation with Mr. Staiger, above detailed, he again answered that it was seven or eight days after Fox commenced to purchase the goods. It appears that Fox ordered the first lot of goods on June 1st, and that it was delivered on June 3d; so that, if Murray's memory is reliable, his talk with Staiger must have been at least five days before the guaranty was signed. Mr. Staiger, however, denied having any such conversation with Murray, and further testified that he did not know that this firm's name was signed to the guaranty by Mr. Hayward until he was so informed by Mr. Smith on July 15th; that although he had been told by Hayward, about the last of June, that he (Hayward) had signed that bond, he understood him to mean that he had signed his own name, and not that of Witzemann & Staiger. Mr. Hayward testified: "At the time I signed it, I thought it was a mere matter of form. . . . It had been in my desk for two or three days. I knew Mr. Staiger had not signed it, but I didn't know why. I knew Mr. Staiger had told Mr. Fox, in my presence, that he would be willing to sign a bond. . . . I assumed it would be all right for me to sign. I didn't speak of it to Mr. Staiger until some time afterward—I guess ten days or two weeks. . . . When I did tell him I merely said I had signed that bond. That is all I said. I naturally supposed he knew I signed it in the name of the firm. I didn't go into any explanation particularly in regard to it. I supposed he thought so at the time." Mr. Staiger testified that he had promised Mr. Fox to sign the bond, provided he would get other sureties to go on it; but when Fox failed to get any other surety he refused to sign it, except on the condition that Fox would assign his salary as steward, in advance, as collateral security, which Fox had declined to do.

The court found that Witzemann & Staiger had no notice until July 15th that Smith was selling goods to Fox upon the faith of their guaranty, nor that Smith looked to them for payment in case Fox failed to pay. It is clear that Witzemann & Staiger are not liable for the goods sold to Fox before the guaranty was signed, as it is not retroactive. And from the testimony of Smith it seems quite as clear that he sold no

goods on the faith of the bond, as he calls it, until after the third day of July, 1889, prior to which \$237.32 of the debt sued for had accrued. On July 3d. after having refused to give Smith an order on the railroad company, and after Smith's refusal to give him further credit, Fox first showed Smith the bond, for the purpose of inducing the latter to extend his credit. It was then, for the first time, that Smith claims to have given Fox credit "on the strength of that bond." It is true he testified that when Fox bought the first lot of goods he said he was to give a bond, but he also said at the same time that the bond had not been drawn up. The circumstances that he did not notify Witzemann & Staiger between the 1st and 3d of July, after Fox had refused to give an order on the railroad company, that he looked to them as sureties, is inconsistent with the claim that he had sold goods to Fox on the faith of their guaranty before July 1, 1889; and there is no explanation of this plainly apparent inconsistency. But further, conceding, for the sake of the argument, that Smith relied upon the guaranty as security for all goods sold to Fox after its date (June 15th), the question remains, Did he rely upon it "in good faith, and without ordinary negligence"? If not, the plaintiff is not entitled to recover, since, as above shown, the execution and validity of the guaranty depend upon the "merely ostensible authority" of Hayward, the assumed agent, by which the principal is bound "to those persons, only, who have, in good faith, and without ordinary negligence, incurred a liability, or parted with value, upon the faith thereof." Ordinary negligence is the absence of ordinary care; "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person would not have done": Anderson's Law Dictionary. If Smith parted with his goods on the faith of the guaranty of Witzemann and Staiger, I think he did so without ordinary care, and consequently with ordinary negligence. In estimating the degree of care exercised by Smith, it should be noted, in addition to the evidence above detailed, that he was not a party to the guaranty, the principal object of which was to indemnify the railroad company. He was but one of a large, indefinite class of unnamed persons, who might have sold Fox goods on the faith of the guaranty to an amount,

for the price of which the guaranty, though properly executed, might have proved to be inadequate security. It should also be observed that Smith's Cash Store was but a short distance from the place of business of Witzemann & Staiger. To whatever extent Smith parted with his goods on the faith of the guaranty of Witzemann & Staiger, I think he did so without ordinary care, and, therefore, that the order and judgment should be reversed, and the cause remanded for a new trial.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order and judgment are reversed and the cause is remanded for a new trial.

DE HAVEN, J.—I concur in the judgment.

ASHTON v. DASHAWAY ASSOCIATION et al.

No. 14,304; June 9, 1893.

33 Pac. 446.

Dismissal of Case—Motion to Vacate.—Where an attorney appears in court five minutes after the dismissal of the cause and rendition of judgment against his client because of the absence of both attorney and client when the case was called for trial, it is not an abuse of discretion for the court, on motion supported by a sufficient affidavit, to vacate the order of dismissal and judgment, and restore the cause to the calendar.¹

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by Charles Ashton against the Dashaway Association and others. The case was dismissed and judgment ren-

¹ Cited with approval in *Cabonne v. Macadoras*, 91 Mo. App. 74, a case where it is held to be not necessarily an abuse of discretion on the part of a trial court to open up a default judgment, even where no full showing of facts is made constituting a meritorious defense.

dered against plaintiff, because of the absence of both himself and his attorney when the case was called for trial. From an order setting aside the order of dismissal and vacating the judgment, defendants appeal. Affirmed.

Tilden & Tilden for appellants; S. Heydenfeldt, Jr., and Jos. P. Kelly for respondent.

SEARLS, C.—This is an appeal from an order of the superior court, setting aside an order of dismissal and vacating a judgment. The cause had been set down for trial on the fifteenth day of October, 1890, but a hearing had been delayed from day to day by reason of other causes on the calendar having precedence, until the morning of October 23d, when it was called for trial at five minutes after 10 A. M., and, neither plaintiff nor his attorney being present, the cause was dismissed, and a judgment was entered on the same day in favor of defendant. Within five minutes after the order of dismissal was entered, the attorney for plaintiff appeared in court, and at once applied to the court on an affidavit and notice for an order shortening the time of notice, which was granted, and a motion to vacate the order and restore the cause to the calendar was noticed for the following day. The court vacated the order of dismissal and restored the cause to the calendar. The notice of motion and affidavit on the part of plaintiff was accompanied by a transcript on appeal to the supreme court in the same cause after a former trial, stipulated to be correct, and which contained a sufficient showing of merits. The affidavit accompanying the notice of motion bears evidence of the haste with which it was probably prepared, and is not to be commended as a model in like cases. It is, however, taken with the other papers in the case, and viewed in the light of the surrounding circumstances, sufficient to authorize us to say that the court below was not guilty of an abuse of discretion in setting aside and vacating the order of dismissal and the judgment thereon. A delay of five minutes in reaching court does not raise a very strong presumption of negligence, and in many places and in numerous courts, owing to the habits and practices of the court as to punctuality, as well as of attorneys and litigants, could hardly be regarded as negligence. Of all these things the

court below is the more competent to determine, and the wide discretion confided to the nisi prius courts in such cases is wisely bestowed. There may be said to be parallel lines, limiting the discretion of courts, acting between which their decisions will be sustained whether one way or the other; and when a court acts in a matter in which such discretion is vouchsafed to it, its order may well be affirmed. In other words, the appellate court, in such cases, does not determine whether it would decide the matter in the same way on the same showing, but only whether the court below has overstepped the legal bounds of its discretionary power. The order appealed from should be affirmed.

We concur: Haynes, C.; Vancief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

CROWLEY v. STROUSE.

No. 14,987; June 9, 1893.

33 Pac. 456.

Appeal—Assignment of Errors.—An Objection that the verdict is against the law is not sufficient to raise the point that plaintiff was guilty of contributory negligence.

Negligence.—That a Person, in Crossing a Street, fails to use the best course to avoid the danger of being run over, does not show contributory negligence.

Negligence.—Whether a Driver of a Wagon at a Street Crossing could resume his course after checking his horse to allow a foot passenger to get out of the way, without negligence, is for the jury.¹

¹ Cited, with numerous other cases in *Hainlin v. Budge*, 56 Fla. 360, 47 South. 831, as in effect bearing out the doctrine of *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332, 55 N. W. 872, 20 L. R. A. 853, to wit: "But independent of the statutory rule, a passenger placed in a position of apparent imminent peril through the negligence of the carrier may recover for injuries received while endeavoring to escape in obedience to the natural instinct of self-preservation, provided he exercises ordinary prudence in view of all the circumstances of the case; and such is the rule, although it subsequently appears that no actual danger existed."

Appeal.—An Objection to an Instruction as not sufficiently explicit will not be considered, where no request was made to make it more explicit.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Julia Crowley sued Mark Strouse to recover for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

Taylor & Craig for appellant; Edward P. Cole for respondent.

TEMPLE, C.—This action was brought to recover damages for personal injuries alleged to have been sustained while plaintiff was crossing Ninth street, in San Francisco, at its intersection with Howard, through being run into by a wagon negligently driven by the defendant. The case was submitted to a jury, which returned a verdict for plaintiff, and defendant appeals from the judgment, and from an order refusing him a new trial.

Plaintiff's testimony tended to prove that plaintiff was crossing Ninth street, going toward Tenth, on the street crossing, when a meat wagon driven by defendant's servant rapidly down Howard turned upon Ninth, over the crossing where plaintiff was; that plaintiff started to run down Ninth, leaving the crossing, and defendant's wagon, without slackening speed, ran upon her, knocking her down, and inflicting upon her the injury complained of. Naturally, the defense contended that by leaving the crossing, and running down the street, instead of hastening across, plaintiff increased the danger; was, in fact, guilty of such contributory negligence as should prevent her recovering. The plaintiff, who was about seventy years old, at the trial stated that she did not see the wagon, but, hearing the noise, she thought it was the street-car (on Howard street, I presume), and so started to run as fast as she could, but had proceeded but a few steps when she was struck. This raised a question, undoubtedly, as to whether plaintiff was not guilty of negligence which contributed proximately to the injury. But the matter was left to the jury, and it cannot be said that there was not sufficient

evidence to justify their conclusion. Defendant's evidence conflicts with that of the plaintiff, but, as the jury evidently did not believe defendant's witnesses, and the court refused a new trial, that is not a matter of much interest here.

There is nothing in the claim that the verdict is against law. The point there made is that there was no proof of negligence on the part of defendant. The argument to sustain the point is that plaintiff was guilty of contributory negligence. This point cannot be made under the objection that the verdict is against law. Still, it is the same as that made under the exception as to insufficiency of the evidence, and need not be further considered.

The defendant complains of the refusal of the court to give certain instructions. The first is as follows: "If you believe from the evidence that the plaintiff brought about the collision by pursuing her intended route, when she could easily and safely have avoided the contact by turning to the left, and from the wagon, then she is guilty of contributory negligence, and your verdict should be for defendant." This instruction was properly refused. It involves the proposition that if the jury can now see that there was some other course open to plaintiff than the one she did take, which would have prevented the injury, she cannot recover. This is not law. That she used bad judgment in the excitement of imminent danger does not necessarily prove negligence. Whether the fact that she took an unwise course was negligence, under the circumstances, was for the jury.

2. An instruction was also asked to the effect that streets may be used by vehicles and pedestrians; that wagons must go over the crossings; and that all persons using the crossings must use a high degree of care and caution for their own safety, and that of others. It is difficult to see any benefit in the instruction for the defendant, but there was no occasion to tell the jury that the streets were for use and included the crossings, and I do not understand that a pedestrian is called upon, when upon a street crossing, to use more than ordinary care for the safety of others. It certainly was no injury to the defendant that the court failed to instruct the jury that the defendant was bound to use a high degree of care and caution at that point. Besides, the jury were fully instructed upon this subject.

3. The next complaint is the refusal to give the following instruction: "If you believe from the evidence that the driver of the defendant's wagon checked his horses seasonably when about to turn the corner, and the plaintiff, seeing the wagon, also checked her speed, the driver of the wagon, seeing his road clear, had a right to suppose that the plaintiff was alert to care for her safety, and would not run against the wagon or the horses, and the driver might lawfully resume his progress at a moderate speed, using proper care to avoid accident." There are several objections to this proposed instruction. If the driver checked the speed of his wagon, and plaintiff also "checked her speed," it would not therefore necessarily follow that the driver, seeing his road clear, could drive on, relying on the alertness of the plaintiff to get out of the way. There may have been indications that she was not alert, or was confused; and if, for any reason, she did not get out of the way, defendant had no right to drive over her. The instruction also assumes that she run against the wagon or horses. This was not conceded to be the fact, but was opposed to testimony of plaintiff's witnesses, and to plaintiff's theory of the case. The instruction, at the best, is as to the effect of testimony. Whether the driver could properly resume his course, supposing that he did check his team, was for the jury. The right to do so did not follow as matter of law from the assumed facts.

4. The next point is that the instruction given by the court on the subject of contributory negligence is erroneous. The only objection made to this instruction was that it was not sufficiently explicit, and was not applicable to the facts and circumstances of the case. This objection admits the correctness of the instruction as a proposition of law. If the defendant desired an instruction which would be in some respects more explicit, he should have drafted the desired instruction, and requested the court to give it. The objection does not state in what respect it failed to be sufficiently explicit. It is not so much an objection to the instruction as a statement that the party is entitled to further instruction, upon what special point, however, was not stated. Under such circumstances the appellant cannot complain. That it was not applicable to the facts was probably intended as a repetition of the same objection. In the briefs no such claim

is made. The defect in the instruction, argued here, was not only not called to the attention of the court, but the objection actually made conceded the correctness of the instruction in that respect: See *Robinson v. Railroad Co.*, 48 Cal. 425. I think the judgment and order should be affirmed.

We concur: Vancief, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

STEWART v. POWERS et al.

No. 15,217; June 9, 1893.

33 Pac. 489.

Pre-emption Claim—Conveyance Subject to Mortgage.—A pre-emption claimant, before final proof and payment, mortgaged the claim to secure the repayment of money borrowed to perfect her title. After she had entered upon and paid for the land, and had received her certificate of purchase, she conveyed a part of the claim to one H. Held that, as the title acquired by the pre-emptioner from the United States inured to the benefit of the mortgagee when acquired, the conveyance to H. was subject to the mortgage.

APPEAL from Superior Court, Contra Costa County; Joseph P. Jones, Judge.

Action by James Stewart against Harriet H. Powers and others to foreclose a mortgage. Decree for plaintiff. Defendants appeal. Affirmed.

Latimer & Brown and Eli R. Chase for appellants; W. S. Tinning for respondent.

HAYNES, C.—In *Stewart v. Powers* (No. 14,956, this day filed), 98 Cal. 514, 33 Pac. 486, the appeal was from the same judgment-roll from which the above-named appellants have taken this appeal.

As to appellants Sarah E. Sharp and Aurelius Sharp, the facts and the questions of law presented are precisely the same as in No. 14,956, and, upon the authority of that case, the judgment should be affirmed as against them.

As to appellant John Harding, a fact not appearing in No. 14,956 is necessary to be stated, viz., that on December 31, 1888, Sarah E. Sharp, the above-named appellant, after she had entered and paid for the land, and had received her certificate of purchase therefor, conveyed to said John Harding a part of the premises so mortgaged, to wit, the south half of the northwest quarter of section 26, township 2 north, range 3 west, Mount Diablo base and meridian. All other facts are sufficiently stated in the opinion in No. 14,956. It must be apparent that if the title acquired from the United States after the mortgage was executed inured to the benefit of the mortgagee, as was there decided, it must follow that it inured at the moment the title was acquired by the pre-emptioner, and that the conveyance afterward received by appellant Harding vested the title in him subject to the mortgage: See *Christy v. Dana*, 42 Cal. 174; *Bull v. Shaw*, 48 Cal. 455, and *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693, cited in the former opinion. It follows that the judgment appealed from should be affirmed as against all the appellants.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed as against all the appellants.

WALLACE et al. v. SISSON et al.

No. 14,566; June 9, 1893.

33 Pac. 496.

Partnership.—S., W. & Co. Made a Business of Hiring Chinese Laborers to railroad and construction companies. No direct compensation was paid for this service, but the understanding was that S., W. & Co. were to have the right to furnish supplies to whatever men they obtained for the companies, which supplies were to be retained out of the men's wages. There being a scarcity of labor, S. proposed the importation of men direct from China. Not meeting with encouragement from the other partners, he took the matter to the president of the S. P. Co., and an agreement was perfected,

under which importations were afterward made. The secretary of the construction company, one of the parties signing the contract, testified that certain advances were to be made under the contract by his own company and by S., W. & Co., to cover the cost of importation; that, according to his recollection, S., W. & Co. signed the contract, and that the last he saw of it it was in the hands of W. The person who was to go to China to secure the importation was to act ostensibly for the S. P. Co., as that company was better known than the construction companies. Directions were sent by the S. P. officials to the steamship agent in China to make the advances and draw on S., W. & Co. for the entire amount. The clerk to whom the draft was presented at S., W. & Co.'s office, in their absence, claimed that they were not to pay it. The secretary of the construction company testified that he then had some conversation with the clerk concerning payment, in which reference was made to the contract. The contract itself was not produced. A large number of Chinese were imported, and worked for the construction company. Held, that there was not merely a privilege to furnish supplies, but a contract to which S., W. & Co. was a party, and which, at least by force of usage, gave them the right to furnish supplies to the men obtained thereunder, and on the death of one of the partners his estate was entitled to a share of the profits arising therefrom.¹

Partnership.—The Rescission of a Partnership Settlement effected through fraud, and return of property received thereunder by the estate of a deceased partner, is not necessary to the maintenance of a suit for further accounting by the representatives of deceased.²

¹ Cited in *Wallace v. Sisson*, 114 Cal. 43, 45 Pac. 1000, a second appeal of the case, where it is held that, after reversal, the court below must at the retrial determine questions of law in strict accordance with the decision, by the higher court, but questions of fact it is not bound to the same strictness.

² Cited with approval in *Oliver v. House*, 125 Ga. 640, 54 S. E. 734, also a case of rescission of a contract of dissolution of a partnership, the court saying: "We are well aware of the general rule that, where a party has been induced to enter into a contract by fraud, he may either affirm or rescind, and that in case he desires a rescission, he must offer to return everything he has received under it. But this rule is not applicable to all contracts."

Cited and approved in *Daniel v. Gillespie*, 65 W. Va. 370, 64 S. E. 256, and the court there say that "the reason for differentiating such a case from one of rescission of a contract of purchase between strangers is apparent. Before the sale each had a right of possession, and the possession of each was the possession of the other. By giving notice of election to rescind, the purchaser virtually puts the seller in statu quo, except that he expects to retain the assets at their real value, with assent of the other party, without relinquishing his right to a just and fair settlement of the accounts."

APPEAL from Superior Court, City and County of San Francisco; J. P. Hoge, Judge.

Action for an accounting, brought by Emeline Wallace and Cora A. Herzstein against Joseph H. Sisson and Milo A. Burke, executors of A. W. Sisson, deceased, and Julia Ann Crocker, executrix of Clark W. Crocker, deceased. Judgment for defendants. Plaintiffs appeal. Reversed.

A. N. Brown (D. M. Delmas of counsel) for appellants; Mastie, Belcher & Mastie for respondents.

HAYNES, C.—Appeal from a judgment for defendants, and from an order denying plaintiff's motion for a new trial. A. W. Sisson, W. H. Wallace and Clark W. Crocker were co-partners in the name of Sisson, Wallace & Co. Wallace died intestate, October 2, 1881. This action was commenced in May, 1884, against Sisson and Crocker, and, Sisson having died before judgment his executors were substituted, and defendant Crocker having died since this appeal, his executrix was substituted in this court. The firm was organized about 1868, having its principal place of business at San Francisco, and subsidiary places of business at different points on the line of the Central and Southern Pacific Railroads during the construction and operation of those roads. The Pacific Improvement Company, the Western Development Company, and the Southern Development Company were corporations severally engaged in the construction of these railroads under contracts with the railroad companies. Sisson, Wallace & Co. were dealers in merchandise, but their principal business was procuring Chinese laborers for the railroad and construction companies, and furnishing them with supplies of food and clothing while laboring for those corporations. As Chinamen were needed for construction or repairs, orders were given Sisson, Wallace & Co. for the men, and these would be procured and forwarded. No compensation was paid by the corporations for this service, but there was an understanding that Sisson, Wallace & Co. should supply the men so furnished with food and clothing, out of the profits of which they would be compensated for their labor and expense in procuring them. The Chinamen labored under the immediate direction of the railroad or construction company,

who also kept their time; but the payrolls, when made out, were delivered to Sisson, Wallace & Co., and the money called for by the rolls was paid to them, and they retained the amounts due them from the Chinamen for supplies, and paid them the remainder. In June or July, 1881, more Chinamen were required than could be obtained here. One Koopmanschap suggested to Mr. Sisson that he could obtain in China all the men required, but it would involve the expense of procuring them, and of their transportation from China. Sisson communicated the suggestion to Mr. Wallace, who thought the risk too great to justify incurring so large an outlay. Sisson, however, took Koopmanschap to Charles Crocker, the president of the Southern Pacific Railroad Company, and introduced the subject of procuring men from China, and an arrangement was afterward perfected under which a large number of Chinamen were imported. What this arrangement was, who were parties to it, and whether it constituted a contract under which Sisson, Wallace & Co. had a right to supply the Chinamen for any definite time, or while they should labor for the construction company, are the principal questions involved in the appeal.

Mr. Wallace left surviving him, Emeline, his widow, Cora, his daughter (the plaintiffs), and a minor son. Mrs. Wallace was appointed administratrix of his estate and the guardian of the minor. Early in January, 1882, negotiations were commenced by the surviving partners for the purchase of the interest of the estate in the partnership, the offer being that they would pay the value of that interest as shown by the annual statement of the assets and liabilities, as of January 1, 1882. Mrs. Wallace insisted that she should be allowed the proportionate part of the value of the goodwill of the business, which was long established, and large and valuable, and also claimed, while admitting her inability to establish the fact that the Chinamen imported from China were so imported under a contract made before Mr. Wallace died, by which the firm had a vested right to furnish them supplies, that the profits which would accrue to the firm during the time they were to labor would amount to a very large sum, and that the estate should have its interest in these profits, or be compensated for them in the settlement. On the other hand, Sisson and Crocker insisted that there was no contract right; that all they had was

a mere privilege of furnishing supplies, which the corporations could revoke at any moment; and refused to allow anything for the goodwill, or for any profits to be realized from supplies to be furnished the Chinamen; that, if their offer was not accepted, they would proceed to liquidate the affairs of the partnership. Mrs. Wallace, admitting her inability to establish the fact at that time, and protesting that if she should ever be able to establish it, she would enforce her rights, accepted the offer made, and, in order to consummate the arrangement, gave bonds for the payment of the debts of the estate and procured a distribution, the sale of the interest of the minor being effected through the probate court. Plaintiffs, claiming to have discovered facts establishing a contract right to the said profits, brought this action for an accounting, alleging that eighteen hundred Chinamen were so imported; that the profits arising therefrom were \$450,000, of which one-third belonged to the estate; that other contracts and rights were secured by said firm shortly before the death of said Wallace of the value of \$50,000, charging fraud and concealment in relation to those contracts, and praying for a disclosure and accounting, and for judgment for the sum of \$180,000, and for general relief.

The court, after finding the uncontroverted facts, and some controverted facts which do not require special notice, upon the principal questions at issue found, in substance, that there was no fraud, misrepresentation, or concealment on the part of defendants; that they informed the plaintiffs, and the plaintiffs well knew, that defendants believed that said business was becoming very lucrative, and that during the years succeeding would yield large and increased profits; that the firm of Sisson, Wallace & Co. did not enter into any contract, nor was there any contract or agreement whatever between said firm, and any of said corporations for the importation of Chinamen, or for the securing such men in China, or the forwarding of them to San Francisco, or the collection or payment of their wages, or the reimbursement of any sums advanced to pay passage money or other expenses, of collecting or forwarding men, or giving to Sisson, Wallace & Co. the exclusive right or any right to furnish said or any Chinamen with supplies, or with the privilege of deducting the accounts of said firm therefor from the wages of such laborers; that the

exclusive privilege which the firm had enjoyed for many years of furnishing supplies to the Chinese laborers was by mere sufferance upon a parol understanding with certain stockholders and officers of the railroad companies; that for the purpose of enabling the firm to protect itself against loss, and to collect the money due them, the pay-rolls were placed in their hands with funds to pay the laborers; that there was no contract giving to said firm any fixed or vested right to the privilege thus enjoyed, or giving any assurance to said firm that such privilege would be accorded to them for any time in the future. These findings are not justified by the evidence.

Before discussing the circumstances under which these importations of Chinamen were made, it is necessary to understand the previous relation of the parties concerned. It is quite true that Sisson, Wallace & Co. did not have a contract by which they were to furnish all the labor for the construction of these roads, nor any particular number of men. These corporations were at all times at liberty to procure men through others, and, according to the testimony of Mr. Charles Crocker, did obtain men through others; but he further testified (and as to this there is no conflict) that whoever furnished men for the work had the exclusive right to furnish the supplies for them. F. S. Dauty, the secretary of the Pacific Improvement and Southern Development Companies, testified: "We looked to them [Sisson, Wallace & Co.] to get Chinamen. They employed Chinamen for us, and sent them down there, and we paid them the proceeds of the Chinese labor. Some one connected with the company would give them an order for whatever men we wanted." Mr. Charles Crocker testified that this mode of transacting the business dated back to 1864. No exception to it is shown to have occurred. Mr. Dauty testified that it had been the custom since he knew anything about the business; that it was a great convenience to them, and enabled them to perform their business with one person instead of a large number of Chinamen who would be employed. This arrangement was, in substance and effect, that Sisson, Wallace & Co. hired the Chinamen to work for them under the direction of the construction companies, at wages agreed upon, and Sisson, Wallace & Co. were paid the whole amount of their wages. There was no contract relation between the Chinamen and the construction companies; the contract was with Sisson,

Wallace & Co. There was, however, no contract with Sisson, Wallace & Co. that they should furnish all the labor required until the roads should be completed, nor for any definite length of time. Each order constituted a contract for the men furnished under it, and the men so furnished were the employees of Sisson, Wallace & Co. so long as they remained upon the work. This, I think, was clearly the effect of the arrangement. But, if I am wrong in this conclusion, it was a custom, uniform and without exception, that they should have the right to furnish them supplies so long as they worked upon the road; and this custom became a term of the contract between Sisson, Wallace & Co. and the railroad and construction companies, attached to every order to the firm to furnish men, as fully as though it had been incorporated in each order given. "Any local or special custom or usage upon the subject will govern as an implied term in the contract between the parties": *Hayes v. Wells, Fargo & Co.*, 23 Cal. 189, 83 Am. Dec. 89. See, also, *Taylor v. Castle*, 42 Cal. 367, 371. "Every legal contract is to be interpreted in accordance with the intention of the parties making it. And usage, when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of the contract, is deemed to form part of the contract, and to enter into the intention of the parties": *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407, and cases there cited. If it be said that the railroad and construction companies could not prevent others from coming into competition with Sisson, Wallace & Co. in furnishing supplies to their Chinamen, it is sufficient to reply that during construction, at least, the railroad was not open to business, and could refuse to allow their construction trains to forward supplies for laborers, except for those who had a contract right to do so. Prior to the importation of men from China, procuring Chinamen was always attended with some expense, and sometimes Chinese labor was scarce, and at such times Sisson, Wallace & Co. were compelled to pay a bonus; but when the importation of men from China, which would require the payment of the passage money and the expenses, was suggested to Wallace, he objected that the risk was too great, and hence the special arrangement afterward made. That a written contract was made between one of the construction companies, Koopmanschap, and Sisson, Wallace & Co.,

concerning such importation, is clear, though such written contract was not produced on the trial, nor shown to be then in existence.

F. S. Douty testified that in 1881 and 1882 he was secretary and treasurer of the Pacific Improvement Company and of the Southern Development Company; that he remembered something of an instrument purporting to be a contract between one of those companies and Koopmanschap, and he thought Sisson, Wallace & Co., "by which Koopmanschap was to go to China, and get a thousand Chinamen; that he was to have \$15 a head, to be used as compensation for his services, and the Pacific Improvement Company or Southern Development Company were to pay this \$15 a head, which was to constitute his consideration. . . . Neither of the companies would recover any portion of it again, and these companies were to pay the transportation of the Chinamen from Hongkong, or the shipping point, to San Francisco, and Sisson, Wallace & Co. were to advance \$15 a head. This \$50 (transportation) and this last \$15 I have mentioned were to be collected back from the Chinamen. That was the sum and substance of the thing that was to be carried out as far as it could be." He further testified that the Chinamen were guaranteed work for a stated time—he thought one year—and were to receive \$30 per month; that he signed it as secretary, and affixed the seal of the corporation; that his recollection was that it had been signed by Koopmanschap and Sisson, Wallace & Co., before he signed, but he was positive as to Koopmanschap's signature, and that Koopmanschap and Wallace were both present when he signed it; that he signed it by direction of Mr. Charles Crocker, and that he last saw it in the hands of Mr. Wallace, and his best recollection was that it was signed by Sisson, Wallace & Co. Koopmanschap was to act ostensibly for the Southern Pacific Railroad Company, as that corporation was better known in China than the construction companies, and was furnished with blank contracts to be executed by him as agent, and by the Chinamen. By this contract the Chinamen agreed to labor for the railroad company for eighteen months from the date of the commencement of labor, at \$30 per month, they to provide their own food and lodging, but to be furnished transportation and provisions from China to the place of destination, and in this contract the Chinamen

acknowledged the receipt of \$65 each as an advancement to be deducted from their wages. For the information of the agent of the Occidental & Oriental Steamship Company at Hongkong, a copy of the above-mentioned contract was sent to said agent with the following letter:

“Per ‘Gaelic.’

“Occidental and Oriental Steamship Company.”

“General Office.

“San Francisco, July 7, 1881.

“Mr. C. H. Haskell, Jr., Agent, Hongkong—

“Dear Sir: Mr. Koopmanschap goes to Hongkong by ‘Oceanic,’ which follows the bearer, to arrange for the hiring of about 1,000 Chinamen for labor on the Southern Pacific Railroad. They are to be forwarded in two lots by our steamers, and contracts will be made by Mr. Koopmanschap, as per copy inclosed. The object of this letter is to make the following authorizations to you: First, advance to Mr. Koopmanschap the sum of fifteen dollars (\$15) per head, to cover expenses in Hongkong; second, advance to the agent of the Chinamen fifteen dollars (\$15) for each man as a bonus to him; third, issue tickets for the Chinese at the regular rates, taking the acknowledgment of the proper person. These advances are, of course, not to be made until the Chinamen go on board. You will then send me a draft on Messrs. Sisson, Wallace & Co., of San Francisco, for the entire expense, namely, passage money and \$30 each extra in U. S. gold coin by the steamers bringing the men. In order that you may have sufficient funds to cover the advances referred to, we have cabled you to make no remittances to us at present.

“Very truly yours,

“CHARLES F. CROCKER.

“Vice-president.”

The first shipment of the Chinamen arrived at San Francisco, September 29 or 30, 1881, two or three days before the death of Mr. Wallace, whose condition had not permitted his presence at the office of Sisson, Wallace & Co. for some weeks, and whose illness had lasted for several months. Mr. Sisson testified that before the arrival of the steamer he had arranged with the Merchants’ Exchange to notify Sisson, Wallace & Co. of the approach of the steamer; that he met the steamer in the

bay with a lighter; received the lists of the Chinamen, and the contracts they had executed with Koopmanschap, took the Chinamen on the barge to the Oakland wharf, put them on the cars, and went with them to the places at which they were to labor. On September 30th the draft drawn by Haswell, the agent of the steamship company at Hongkong, for \$22,560, pursuant to the above letter from Charles F. Crocker, was presented to Mr. Scott, the head man of Sisson, Wallace & Co., Mr. Wallace being then on his deathbed, Mr. Crocker absent in Europe, and Mr. Sisson absent with the Chinamen on their way to the front. Concerning the payment of this draft, Mr. Douty testified that he had some conversation with Scott by telephone to the effect that Scott contended that he should not pay it; that witness told him to look at his contract, and Scott replied that he had no contract. "Well," I said, "then find it, because you are to handle this; but, whatever there is, if it is not perfectly understood, we will make you good in that matter." This draft was for \$80 per man (\$22,560), and was afterward repaid by the Southern Development Company, except the \$15 per man advanced by Sisson, Wallace & Co., and which they were to collect from the Chinamen.

The foregoing conversation between Douty and Scott, in reference to the contract and payment of the draft, occurring while the matter was still fresh in Mr. Douty's recollection, is strong evidence, not only that the contract was made and signed by Sisson, Wallace & Co., but that it provided for the payment of these drafts by them. Besides, the letter of Charles F. Crocker to Haswell not only corroborates Mr. Douty as to the terms of the contract, but it is inconceivable that he would direct the agent of the steamship company to draw drafts upon Sisson, Wallace & Co. for each of the two contemplated shipments, amounting to \$40,000 each, without a contract right so to do. If further corroboration were needed, it would be found in the fact testified to by Mr. Douty that Mr. Charles Crocker sent for him; that he found Koopmanschap and Wallace there; that Mr. Crocker directed him to execute the contract; that Koopmanschap and Wallace were both present when he signed it; that he last saw it in the hands of Wallace, and that the importations were in fact conducted in the manner and according to the terms of the contract, as narrated by him. It is true it is not stated by Mr. Douty, nor

by any witness, that the written contract provided in terms that Sisson, Wallace & Co. were to have the right to supply these Chinamen during their term of labor, nor was it necessary that it should, in view of the long-continued custom or usage existing in that regard. Sisson, Wallace & Co. advanced \$15 per man, and took their chances of collecting it from the wages of the men. They had no recourse to the development company in any event. If the steamer and all the Chinamen had gone to the bottom of the ocean, they would have been liable for the \$15 per man advanced for them by the steamship company, and this was a good consideration for the contract. Nor was their connection with the matter to end with the collection of this \$15 out of the wages of the Chinamen. They were to collect the \$50 passage money for the development company by keeping out of their wages "as much as they could stand" until it was repaid, as appears by the testimony of Mr. Crocker, who made the arrangement. Mr. Horn, a witness for plaintiffs, testified that he copied a contract relating to the importation of those Chinamen in the office of Sisson, Wallace & Co., and, while he is clearly in error in some particulars, and inconsistent in others, it is apparent that he had a knowledge of facts that he could not have known unless he had seen such a contract, or learned them in some manner in Sisson, Wallace & Co.'s office; and, if the firm and its other employees had no knowledge of such contract or agreement, he could not well have learned it from them.

Respondents contend that, however the fact may be in regard to a contract of the character above stated, there was such a conflict of evidence as will not permit the finding to be disturbed. It is true Mr. Crocker testified, as did other witnesses, that under the prior course of business Sisson, Wallace & Co. had a mere privilege of supplying the men which they procured; that there never was any contract; that it was simply an understanding. But that is a conclusion erroneously drawn from the facts to which they testify; and as to the imported men Mr. Crocker did not remember that there was a contract, and the defendants and their employees testified that they never knew of such, or any, contract. A careful reading of the testimony, however, will show that these witnesses also testify to conclusions, rather than to the facts which constituted the terms of the contract, and they especially em-

phasize their denial and that there was any contract giving them the right to supply the imported men with food and other merchandise. These denials are not sufficient, in view of the whole evidence to create a doubt that there was a contract or agreement for the importation of these Chinamen to which Sisson, Wallace & Co. was a party, and which, at least by force of usage, gave them an exclusive contract right to supply them during the term of their employment; and evidence not sufficient to create a doubt cannot be held sufficient to raise a material conflict.

It is further contended that plaintiffs had as full knowledge of all the facts at the time of the settlement as the defendants. Mrs. Wallace admitted that she had known for ten years the general course of the business, and expressed her belief that there must have been a contract relating to the importation of these Chinamen; but defendants denied that there was such a contract, and this they still deny. They cannot, therefore, contend that she knew of a contract which they say never existed, for to do so would be to admit what they deny. Nor does it appear that they ever informed her of the existence or contents of the letter to Haswell, which had been copied in their office; nor that the drafts had been drawn upon and were paid by them; nor that the firm advanced \$15 to each Chinaman, and which they were to collect from his wages; nor that they were to collect and pay to the construction company the \$50 passage money; nor that, so far as the evidence discloses, all the communications sent to Koopmanschap while he was in China, in relation to this business, were addressed to Sisson, Wallace & Co., all of which were known to defendants before the settlement. The finding, therefore, that they did not conceal from plaintiffs, "or fail to disclose to them, any fact within their knowledge concerning the same," cannot be sustained.

Respondents further contend that, if the contract of settlement was procured by fraud, misrepresentation, or concealment, plaintiffs' only remedy is by rescission; that they cannot affirm in part and reject in part, and are, therefore, not entitled to recover on their complaint. It is true, as a general rule, that a rescission must be entire; that a party to a contract, who desires to rescind it, must surrender up everything he has received under it; and these rules apply generally to

contracts of purchase and sale. They do not apply, however, to all cases of contracts. In this case Wallace's heirs could not become partners in the firm without the consent of the survivors. Mrs. Wallace testified that Sisson proposed to her to permit the interest of the estate to remain in the business at least for a year; that it would be profitable, and that she understood until about January 3, 1882, that it would so remain, when she was informed that such an arrangement would not be made; that it was proposed to take into the firm four of their employees; that they would pay the estate what the annual statement would show they were entitled to, viz., \$153,748.20; that she insisted the estate should be allowed for the goodwill of the business, and for the profits which would accrue from supplies furnished the imported Chinamen, and that she had been offered by a business man \$25,000 more than the sum they offered. Plaintiffs could not retain their interest in the firm, nor sell to a stranger, without defendants' consent. The sum offered she was at least entitled to. It did not belong to the surviving partners. In paying that sum they did not part with their own money or property. It was a settlement of the partnership affairs. It was not a voluntary transaction in the broad sense of an ordinary contract. She (and we use the term as representing the heirs) had her choice of two alternatives: to take what was offered, or submit to a liquidation, and to this extent only was it voluntary. If it be true that there was concealment or misrepresentation, that all that was valuable was not brought into the transaction, that something was withheld that should have been estimated, can it be said that before she can have the wrong corrected she must refund to the defendants all that she has received, when she could not receive, hold, own and control that she had parted with, and which defendants retained, and that a court of equity cannot compel them, without such rescission and surrender, to account for that in which she had an interest, and which was not brought into the accounting upon which the settlement was had? Even if it were necessary to set aside the agreement, it could not be necessary that the money paid should be refunded. It is not claimed that defendants were in any manner deceived or wronged, or that they have paid money that plaintiffs were not in any event entitled to. The law does not require idle or unnecessary acts to be performed, and

surely it cannot be necessary that plaintiffs should put back in defendants' hands the money they have in order that they may recover it back with other moneys in addition thereto. These views are fully sustained by the authorities: See *Watts v. White*, 13 Cal. 321; 2 *Parsons on Contracts*, 1, *p. 277, and note R; *Pierce v. Wood*, 3 Fost. (N. H.) 519; *Elfelt v. Hart*, 1 *McCrary*, 11, 1 Fed. 264. But in strictness this is not an action for rescission, nor is a rescission necessary. The surviving partners have the legal right to the possession of the partnership property and assets, but for which they are required to account. The settlement had was but an accounting, and this action is only for an accounting of a matter not taken into the former accounting. The conclusion to which we have arrived renders it unnecessary to consider alleged omissions to find, and exceptions to evidence, none of which seem to cover any vital point. The judgment and order appealed from should be reversed and a new trial granted.

We concur: Searls, C.; Vanelief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial granted.

WHELAN v. BRICKELL et al.

No. 15,074; June 10, 1893.

33 Pac. 396.

Public Land.—In 1860 a Married Man Went into Possession of part of the government land known as the "outside lands" of San Francisco. In 1863 he died, and his wife, with their children, continued in possession, and was in possession at the passage of act of Congress of March 8, 1866 (14 Stat. 4), relinquishing and granting the right and title of the United States in said lands to the city of San Francisco, in trust to be "disposed of and conveyed by said city to parties in the bona fide actual possession thereof by themselves or tenants on the passage of this act," on such terms as the legislature should prescribe. While the husband and wife were in possession, they executed a declaration of homestead on the land under the

California homestead act of 1862, by which the homestead estate, on the death of either, vested absolutely in the survivor. Thereafter the city deeded the land to the widow, she having complied with the various ordinances and legislative acts relative thereto. Held, that as she had bona fide actual possession at the passage of the act, no trust arose under the conveyance to her in favor of said children. *Baker v. Brickell*, 87 Cal. 329, 25 Pac. 489, 1067, followed.

Estate of Decedent.—Where Land Belongs to a Wife, the fact that she, as administratrix of her husband, returned said land as assets of his estate is immaterial, and does not estop her to claim it as her own.¹

APPEAL from Superior Court, City and County of San Francisco.

Action by Fairfax H. Whelan, administrator, against John Brickell and others. From a judgment for defendants, plaintiff appeals. Affirmed.

F. R. King for appellant; A. N. Drown for respondents.

McFARLAND, J.—This case has been here in various forms several times: *Brickell v. Batchelder*, 62 Cal. 623; *Batchelder v. Brickell*, 75 Cal. 373, 17 Pac. 441; *Batchelder v. Baker*, 79 Cal. 266, 21 Pac. 754; and *Baker v. Brickell*, 87 Cal. 329, 25 Pac. 489, 1067. The case at bar must be affirmed upon the authority of the case last above mentioned—87 Cal. 329, 25 Pac. 489, 1067. That case, it is true, was decided upon its merits, after a full trial, while in the case at bar judgment was rendered for defendants upon the sustaining of a demurrer to the complaint. There is an effort here to give the case a somewhat different phase, but it readily appears upon the face of the complaint that the material facts stated are the same as those passed upon in *Baker v. Brickell*. After a careful consideration of the briefs of counsel for appellants, we are satisfied that the complaint does not state facts sufficient to constitute a cause of action, and we do not think that further discussion of the case is necessary.

The judgment is affirmed.

We concur: De Haven, J.; Fitzgerald, J.

¹ Cited in *Baker v. Brickell*, 162 Cal. 621, 622, 36 Pac. 950, as part of the history of the latter case, and as having approved the decision on a former appeal of it.

PETERSEN v. TAYLOR.*

No. 15,116; June 12, 1893.

33 Pac. 436.

Action for Trust Funds—Sufficiency of Evidence.—Plaintiff alleged that defendant collected money belonging to another, and agreed to hold it till a dispute as to its ownership was settled, giving a written acknowledgment that he so held it; that such dispute was settled; and the assignment of claimants' rights to plaintiff. Defendant's answer admitted receipt of the money, but denied plaintiff's other averments. Defendant also pleaded a former judgment on the same cause of action. Plaintiff put in evidence defendant's written acknowledgment and the assignments to himself, and one of his assignors testified that defendant had not paid the money. Defendant did not put in evidence any memorandum of settlement, nor the judgment pleaded by him. He admitted his signature to the acknowledgment, but said that he had no memory of the matter, and he failed to contradict any of plaintiff's testimony. Held, that a verdict for defendant was not justified.

Trust—Limitation of Actions.—A Certificate That the Maker thereof holds certain money to abide settlement of disputes as to its ownership creates an express trust, with no definite time fixed for its termination by payment, and hence limitations will not run against a claim on such certificate until the true owner has been ascertained, and a demand made by one showing a right to the money.

APPEAL from Superior Court, City and County of San Francisco; J. P. Hoge, Judge.

Action by H. M. Petersen against Joseph W. Taylor. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

Nagle & Nagle for appellant; J. C. Bates for respondent.

HAYNES, C.—Appeal from judgment and from an order denying a new trial. The complaint states three causes of action, the second and third, however, being different counts upon the same matter. The first cause of action is to recover

*Rehearing granted and judgment and order denying a new trial affirmed: 100 Cal. xviii, 34 Pac. 724.

\$125, moneys alleged to have been received by defendant for the use of plaintiff on the —— day of December, 1887. The first count on the second cause of action is for moneys had and received, amounting to \$655, and the second count is for the same sum, alleging the facts substantially as follows: That on July 2, 1884, defendant collected from the city of San Francisco said sum on two certain judgments, one in favor of B. Bonnett, and the other of C. H. Parker; that defendant agreed to hold said money until certain disputes should be settled between B. Bonnett and Eli Bonnett as to which was entitled to the money, whereupon defendant signed and delivered to Eli Bonnett, for the benefit of all parties, the following paper:

“This is to certify that I have the sum of \$655, collected from the city and county of San Francisco in the suits of B. Bonnett and C. H. Parker against the city and county of San Francisco, claimed by Eli Bonnett, but attached in the suits of Petersen vs. Bonnett, as the money of B. Bonnett, to abide settlement or suit against me to determine the ownership of said sum.

“[Signed] JOS. W. TAYLOR.

“July 2, 1884.”

It was further alleged that all disputes about the ownership had been settled, and all claims of Eli and B. Bonnett thereto had been sold and assigned to plaintiff, and on or about December 1, 1887, plaintiff notified defendant thereof, and demanded payment. To the first cause of action the defendant answered, denying the facts alleged, and pleaded the statute of limitations, and made a like answer and plea to the first count of the second cause of action. To the second count he answered, admitting that on July 2, 1884, he collected in his own right in the cases mentioned \$12,000, but denied that he agreed to hold the \$655 until certain or any disputes should be settled between the Bonnetts; admitted that he signed and delivered the writing set forth in the complaint; alleged that all disputes concerning the same were settled July 8, 1884, by release in writing, as follows:

“We have this day settled all our affairs, and the judgments in the actions of B. Bonnett vs. The City and County

of San Francisco, and C. H. Parker vs. The City and County of San Francisco, belong to Jos. W. Taylor.

“[Signed] B. BONNETT.

“ELI BONNETT.

“JOSEPH W. TAYLOR.”

He also denied the assignment of the claims of said money to plaintiff, or that anything was due under it, and pleaded the statute of limitations. For a separate defense defendant pleaded two several judgments in his favor against the plaintiff in actions brought by the plaintiff against him upon the same cause of action. The cause was tried without a jury, findings were waived, and judgment went in favor of defendant for costs.

Appellant contends that the evidence does not justify the decision, specifying several particulars. As to the first cause of action the testimony was confused, indefinite, and conflicting. We cannot say that the conclusion reached by the court as to that cause of action is not justified by the evidence. As to the remaining cause of action we come to the opposite conclusion. Plaintiff put in evidence the paper set out in the complaint, and the several assignments from Eli and B. Bonnett indorsed thereon, showing that he had the sole ownership thereof, and of all moneys mentioned therein. This, of itself, made a *prima facie* case for the plaintiff; but, in addition, B. Bonnett (called by the plaintiff) testified to the facts and circumstances of the transaction, and that said sum had not been paid. The defendant did not put in evidence the memorandum of settlement made by him with the Bonnetts, nor give any testimony tending to show that it included the money in question, nor did he put in evidence either of the judgments pleaded in bar of the action. These averments in the answer are deemed denied, and the burden was on defendant to prove them. Neither the answer nor the copy of any paper therein is evidence for any purpose. The defendant was examined as a witness in his own behalf, and admitted his signature to the paper set out in the complaint, and said, in substance, that he knew nothing about the suits mentioned in it; did not remember that he had anything to do with them, or whether the money was attached in his hands. This was all

the testimony on the part of the defendant as to either count of the second cause of action. He did not in any manner refer to the testimony of B. Bonnett, nor contradict nor explain any of the facts or circumstances testified to by him, and which, with the written instrument referred to, was quite sufficient to require a judgment for the plaintiff. Nor does it appear that this cause of action was barred by the statute. The evidence discloses the fact that a contract for street work was assigned to defendant by Eli Bonnett, upon which defendant had advanced some \$4,000; and when the money was collected by defendant there was a balance in his hands of about \$3,500. An attachment had been served on \$655 of it, based upon a claim that it, the money attached, belonged to B. Bonnett. Defendant paid Eli Bonnett the balance in his hands except \$655, and executed the paper set out in the complaint. This money was retained by defendant with the consent of Eli Bonnett, and, as the testimony shows, actually belonged to him, though claimed by Petersen, the plaintiff here, as well as the defendant, to belong to B. Bonnett, against whom the attachment was issued. Whether the circumstances under which defendant originally received the money constituted him a trustee or not, the instrument signed by him constituted an express trust, with no definite time fixed for its termination by payment. The statute, therefore, did not run until notice of the settlement and demand of payment: *Wright v. Ross*, 36 Cal. 433. By the terms of the instrument he was a mere custodian of the money until the true owner was ascertained, and not until a demand made by one who showed a right to the money was he in default; nor is he chargeable with interest prior to the date of the demand and refusal. The judgment and order appealed from should be reversed, and a new trial granted as to the second and third causes of action only.

We concur: Searls, C.; Vanelief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial is granted as to the second and third causes of action only.

BELL et al. v. SAUSALITO LAND AND FERRY COMPANY.

No. 14,367; June 13, 1893.

33 Pac. 449.

Easements—Water Rights.—Plaintiff, With Defendant's consent, conducted water to a tank on his lot from a spring on defendant's lot. Thereupon he took possession of another lot, owned by defendant, and conducted water to the latter lot from the tank. Having used the water about eight years, he surrendered possession of the lot to which he had no title, and about a year thereafter purchased the same with its appurtenances, and sold the lot on which was the tank. In the conveyance to plaintiff no mention was made of the right to use the spring, but there was evidence that it was understood that he might use it so long as defendant did not need it. Held, that plaintiff had no water rights in the spring appurtenant to the lot.

Easement—Water Rights.—The Court Having Found for plaintiff in an action to enjoin the cutting off of the water, an assignment of error that there was no evidence to show any grant of the use of the waters of the spring to plaintiff was sufficient.

Easement—Water Rights.—And so of an Assignment that there was no evidence that an easement had been created in favor of the premises deeded to plaintiff, or that a servitude had attached to the land where the spring was located.

Easement—Water Rights.—An Assignment That There was no evidence to show the existence of an easement at any time in favor of plaintiff's land to the spring was likewise sufficient.

APPEAL from Superior Court, Marin County; E. B. Mahon, Judge.

Action by Julia Emma Bell and another against the Sausalito Land and Ferry Company. From a judgment for plaintiffs, defendant appeals. **Reversed.**

F. Wm. Reade and John Currey for appellant; Taylor & Craig for respondents.

HAYNES, C.—This action is for an injunction to restrain defendant from removing certain water-pipes, and depriving plaintiffs of water supplied thereby, from a certain spring,

and for damages for alleged interruptions thereof. The executors of Alexander Forbes were made parties defendant, but they did not answer, and do not appeal. Plaintiffs had judgment granting a perpetual injunction, from which, and an order denying the corporation a new trial, it now appeals.

There is no material conflict in the evidence. Mr. Bell was the only witness on the part of the plaintiffs, and the testimony of defendant's witness was mainly to additional facts, which were not rebutted. In 1874 the plaintiffs were the owners and in possession of lot 2, block 29, of the village of Sausalito. Appellant had formerly owned that lot, and was then the owner of lots 3, 4, and 5 in the same block, and also of another lot, upon which was a blind spring, about six hundred feet distant from lot 2, and which, with the knowledge and consent of appellant, plaintiffs improved, and conducted the water therefrom through pipes to a tank on lot 2, and from which water was supplied to their dwelling on said lot. In 1875 plaintiffs bid off said lots 3, 4, and 5 at an auction sale, but made no payment thereon, and obtained no title, but afterward took possession of them, and conveyed water by pipes from the tank on lot 2 to said lot 3, and used water thereon for cultivating vegetables. One or two years prior to June 21, 1884, plaintiffs surrendered possession of lots 3, 4, and 5 to appellant, and on the date last named Mrs. Bell entered into a contract in writing with appellant for the purchase of lot 3 for the sum of \$500, and completed her payments and received a deed therefor February 25, 1886. About the time said contract of purchase was made plaintiffs conveyed lot 2 to the Forbes estate, built a house on lot 3, and removed thereto. In the fall of 1884 appellant cut off the connection between the spring and the Forbes tank on lot 2 by taking up the pipe near the spring, and at the same time connected the tank with appellant's water-mains, from which the tank was thereafter supplied, and for the water so furnished the usual rates were charged and paid. The contract of sale of lot 3 to Mrs. Bell was silent in regard to water rights or any appurtenances to the lot. The deed granted the lot with its appurtenances, but made no mention of the water by reservation or otherwise. The complaint alleged that the water from said spring had continuously and openly, and with the full knowledge of, and without objection from, and with the ac-

quiescence of, defendant, been used on lots 2 and 3, and that for more than five years the use of the flow of water from the spring had attached as an appurtenance to lot 3. The complaint also alleged that on March 30, April 16. and May 5, 1885, and on two different occasions in 1886, appellant removed a portion of the pipe which conveyed water to lot 3.

It is contended by respondents that the assignments of error are insufficient, and for that reason the judgment and order should be affirmed. Appellant specifies that "there was no evidence to show any grant of the use of the waters of the spring to the plaintiffs. There was no evidence to show an easement had been created in favor of the premises deeded to plaintiffs (lot 3), or that a servitude had attached to the land where the spring was located. There was no evidence to show the existence of an easement at any time in favor of the plaintiffs' land to the spring referred to." It is also specified that the above facts are not found by the court. We think these specifications sufficient. They call attention directly to the controlling questions in the case, and are to be viewed in the light of the findings as made by the court. The findings are merely of probative facts, unless the conclusions drawn from them, and styled and intended as conclusions of law, may be regarded as ultimate facts. These conclusions are as follows: "(1) The hydrants and pipes and the water flowing from said spring to and in the same are necessary for the benefit and enjoyment of said lot 3, and are appurtenant to said lot. (2) The appurtenances, including said hydrants and pipes and said water and the use and flow thereof, passed to the plaintiff Julia E. Bell, by said deed. (3) The plaintiffs are therefore entitled to a decree as prayed for in their complaint." If the first and second of the above-quoted conclusions are to be regarded as findings of fact, they are not justified by the evidence; and if they are conclusions of law, and not findings of fact, the ultimate facts are not found, nor are probative facts found, which necessarily or conclusively show the existence of the ultimate fact of an easement appurtenant to lot 3, and charged upon the lot upon which the spring is situated as the servient estate. An easement can only be created by grant or by prescription from adverse enjoyment for a period sufficient to bar an action; in this state, five years. At the time the spring was improved,

and the water conveyed to lot 2, appellant had no interest in that lot, nor had plaintiffs any interest in lot 3. Plaintiffs not only allege that the water was conveyed to lot 2 with the knowledge and consent of appellant, the owner of the spring, but Bell testified that he talked it over with one of the directors; and Mr. Harrison, a director and chairman of the executive committee of the corporation, testified that it was understood plaintiffs might use the spring so long as they did not need it. Under these circumstances, plaintiffs could acquire no right or easement in the spring, nor create any servitude upon the land on which the spring was situated, by possession and use under the license for any length of time, nor is there any evidence that they ever asserted any right otherwise than under this license. No easement was therefore created in favor of lot 2, nor could there be in favor of any other lot. Plaintiffs were not restricted by the terms of the license to a part of the waters of the spring, so there was no opportunity for acquiring a right to another portion of the water by adverse user. Of course, I do not mean to say that, notwithstanding the license, a right by adverse possession and use might not have been created; but that could only have been accomplished by a repudiation of the license, and the use of the water under an unequivocal assertion of right. But no claim or assertion of any such right was ever made until after the purchase of lot 3, and no adverse right in favor of lot 3 could have been created after that, as the water was cut off near the spring a few months after the purchase, and has never since flowed either to lot 2 or 3, through these pipes, or otherwise than through appellant's water-mains.

Plaintiffs' claim in this action is based, however, upon an easement appurtenant to lot 3, existing at the date of the purchase; and it is obvious that, unless it then existed, it could not have passed by the deed made nearly two years later, the water from the spring having soon after the purchase been cut off, and the right, by repeated disconnections with the tank, having been emphatically denied. The question remaining to be considered, therefore, is whether a right appurtenant to lot 3 was created by plaintiffs' use of the water thereon during the time they were in possession of that lot without right or title thereto, and which possession and use ceased one or two years before the purchase. The complaint

alleged that this use was open, and with the knowledge of appellant. The court found that the water was used upon lot 3 "after 1875, up to the time of the sale," but did not find that the use was known to appellant. No evidence was given on the part of the plaintiff that such use was known, unless it could be inferred from the cultivation of vegetables and the existence of hydrants thereon, while the testimony on the part of defendant was positive that such use was not known until after the pipe had been taken up at the spring, and the tank on the Forbes lot had been supplied from appellant's mains; that it was afterward found that the supply was short at the Forbes tank, and, upon investigating the cause, the pipe leading from the tank to lot 3 was discovered and disconnected, presumably at the date of the first interruption alleged in the complaint, viz., March 30, 1885. This evidence was not disputed, nor was there any evidence of any claim of right to such use of the water in hostility to or otherwise than under the license. The mere finding of the use, without finding that it was with the knowledge of appellant, who was the owner both of the lot and the water, is insufficient to support the judgment; and, if the existence of an easement is found by the court, the evidence does not justify it. It would, indeed, be a strange conclusion that plaintiffs, having a mere license to use the waters of the spring upon their own lot, could, without the knowledge of appellant, use it upon one of appellant's lots, in which they had no interest, and thus create an easement in favor of one of appellant's lots, and a servitude upon another, and then sell lot 2 to a third party, who acquired no right to the spring, and buy lot 3, with a valuable easement created by themselves, and of which the seller had no knowledge. The judgment and order appealed from should be reversed.

We concur: Searls, C.; Vancief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed.

DOWLING v. ALTSCHUL.

No. 14,978; June 13, 1893.

33 Pac. 495.

Street Assessment—Appeal to City Council.—Act of March 18, 1885, page 147, section 11, provides for an appeal to the city council from an act or determination of the superintendent of streets as to the legality of any assessment; that on such appeal the city council may “confirm, amend, set aside, alter, modify, or correct” the assessment, as it may deem just; that all decisions of the council shall be conclusive, on all persons entitled to such an appeal, as to all errors and irregularities which the council might have remedied. Held, that an appeal on the ground that an assessment for paving a cul-de-sac failed to assess the land at the end of the same presented a question which the city council had power to determine, and therefore their decision was conclusive.

APPEAL from Superior Court, City and County of San Francisco; Eugene R. Garber, Judge.

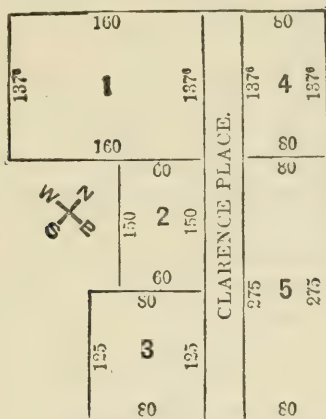
Action by J. J. Dowling against L. Altschul to enforce a street assessment. Judgment for defendant. Plaintiff appeals. Reversed.

J. C. Bates for appellant; Sullivan & Sullivan for respondent.

VANCLIEF, C.—Action to enforce a street assessment in the city of San Francisco, in which the judgment was in favor of the defendant. The plaintiff brings this appeal from the judgment on the judgment-roll, in which there is no bill of exceptions, and contends that upon the findings of fact the judgment should have been in favor of the plaintiff. There is no question that the plaintiff entered into a valid contract with the superintendent of streets to construct sidewalks and curbing, and to pave the roadway throughout the entire length of Clarence place, which is a cul-de-sac thirty-five feet in width, extending northwesterly from Townsend

street a distance of four hundred twelve and one-half feet, as shown by the following diagram:

DIAGRAM.



'TOWNSEND STREET.

The black figures on the diagram represent feet, and the red (which are large) designate the numbers of lots assessed. The land adjoining the northwesterly end of Clarence place was not assessed; and for this reason alone the defendant, who owns lot No. 3, contends that the assessment is not equal or uniform, and is therefore void, and so the trial court expressly found, as a conclusion of law. It is found as a fact that the defendant duly appealed from the assessment to the board of supervisors, and that the board affirmed the assessment; and counsel for appellant contends that under section 11 of the act of March 18, 1885 (page 147), such appeal was respondent's only remedy, and that the affirmance of the assessment by the board of supervisors is conclusive. And, as I think this point should be sustained, it will be unnecessary to consider whether the decision of the supervisors was erroneous or not. Section 11 of the act above cited provides for an appeal to the city council from any act or determination of the superintendent of streets as to the correctness or legality of any assessment, and that "upon such appeal the city council . . . may confirm, amend, set aside, alter, modify or correct the assessment in such manner as to them

shall seem just, . . . and may instruct and direct the superintendent of streets to correct the warrant, assessment, or diagram in any particular, or to make and issue a new warrant, assessment, and diagram. . . . All the decisions and determinations of the city council . . . shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities, and irregularities which said city council might have remedied or avoided; and no assessment shall be held invalid, except upon appeal to the city council as provided in this section, for any error, informality, or other defect . . . in the assessment, when notice of the intention of the city council to order the work to be done has been actually published in any designated newspaper in said city for the length of time prescribed by law before the passage of the resolution ordering the work to be done." In this case it is found that the notice mentioned in the last clause of the above quotation was duly published, and that all the proceedings up to the time the assessment was levied were regular, and it is also clear that the error in the assessment, if error it was, might have been remedied or avoided by the city council on the appeal. The assessment upon defendant's lot was not so totally void that it could not have been amended by order of the city council. It was founded upon a valid contract for work that had been completed according to the contract, and for which defendant's whole lot was assessable, and was made by an officer (superintendent of streets) having plenary power to make it. In consequence of the alleged error, defendant's lot was assessed for \$490.30, when it should have been assessed at only about \$470. If such an error cannot be corrected on appeal to the city council, I think no substantial error in an assessment can be so corrected, and that it must follow that section 11 of the act of March 18, 1885, so far as it purports to authorize the city council on appeal to amend, alter, modify, or correct an assessment, is wholly ineffectual.

To the point that the error could not have been corrected on appeal, and, therefore, that defendant is not concluded by the decision of the board of supervisors, counsel for respondents cite *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677, *Dyer v. Harrison*, 63 Cal. 448, and *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373. But in none of these cases does it appear that

any question as to the effect of the failure to appeal, or of a decision on appeal, was raised or expressly decided. Nor does it appear that any such question possibly could have been involved in the leading case (*People v. Lynch*), which arose in Sacramento city, and was governed by the charter of that city, in which I find no provision analogous to section 11 of the general act of March 18, 1885. While I find no case construing section 11 of the act of 1885, or any other similar statute, which sustains the position of respondent's counsel, I think the following late cases, and many earlier ones, are in point for the appellant: *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764; *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226. I think the judgment should be reversed, and the lower court directed to render judgment for the plaintiff on the findings of fact.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reason given in the foregoing opinion the judgment is reversed and the lower court is directed to render judgment for the plaintiff on the findings of fact.

HARRISON, J.—I concur in the judgment for the reason that in my opinion the assessment was correct. The provision in the statute that the assessment shall be made upon the lots and lands fronting upon the work must be construed as referring to the lots which front laterally upon the street, and not as including one which abuts upon the bottom of a court or a cul-de-sac. I am not prepared to say, however, that the act of the board of supervisors, confirming an assessment which is made in manifest violation of the provisions of the statute, concludes the owner from making such defense in an action to enforce the assessment.

HOGAN v. BURNS.

No. 15,037; June 27, 1893.

33 Pac. 631.

Appeal—Conflicting Evidence.—Where Plaintiff and Defendant are the principal witnesses in the case, and their testimony is conflicting, a judgment for plaintiff will not be disturbed in the absence of any reason why the court should have believed defendant rather than plaintiff.

Promissory Notes.—An Answer in an Action on Notes which denies that certain of the first four notes have not been paid, and alleges that they have been “satisfied and discharged,” does not plead an accord and satisfaction.

Promissory Notes.—In Such Action It Appeared That After the date of such first four notes defendant gave plaintiff an order at the bottom of a stated account against him amounting to \$70 less than the face of such notes on the attorney for the executor of a certain estate; that such attorney accepted the order, reciting in the acceptance that “certain moneys will in the future, in all probability, become due and payable to” defendant out of the income from certain real estate belonging to such estate, and that the order was payable only out of moneys coming from such estate, “and not claimed or affected by attachments or other claims.” Held, that, though an accord and satisfaction was pleaded, it was not error to exclude such account, order, and acceptance from the evidence in the absence of any offer to show by other evidence that they were intended or accepted as satisfaction of either of the notes, or that either the account or order had been paid.

APPEAL from Superior Court. City and County of San Francisco; William T. Wallace, Judge.

Action by James Hogan against Joseph T. Burns on promissory notes. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles F. Hanlon for appellant; John H. Dickinson (Henry E. Monroe of counsel) for respondent.

VANCLIEF, C.—Action on twelve promissory notes—two for \$80 each, eight for \$75 each, and two for \$60 each. The answer of defendant admits the making of the notes, but alleges that each note “was without good or valid or legal con-

sideration; that the only consideration therefor was an account for the sale and delivery by plaintiff to defendant by retail, or by the drink, of spirituous and malt liquors, wine, and cider; and that the amount of said account exceeded the sum of five dollars; but did not exceed the sum of twenty-five dollars; and that such an account constituted the only consideration for each of said notes." Further answering, the defendant denies that the first four of said notes had not been paid, but alleges that they have been "satisfied and discharged." The court found as follows: "All the allegations of the complaint are true. Each of the promissory notes set forth in said complaint was made to plaintiff by the defendant upon valuable consideration therefor. No part of the consideration for either of said promissory notes was the sale or delivery by plaintiff to the defendant of any liquor, spirituous or malt, or of any wine or cider, and neither one of said promissory notes has been paid, satisfied, or discharged in whole or in part"; and thereupon rendered judgment for the full amount of principal and interest of all the notes. The defendant has appealed from the judgment and from an order denying his motion for a new trial.

1. The appellant contends that the findings of fact are not justified by the evidence. There is no merit in this point. The plaintiff and defendant were the principal witnesses, and their testimony was directly in conflict upon all material issues; and no reason appears why the court should have believed the defendant rather than the plaintiff.

2. Appellant claims that the court erred in rejecting the following papers offered as evidence for the defendant:

"San Francisco, May 1, 1887.

"Joseph T. Burns to James Hogan, Dr.

"For board, lodging, goods furnished, services rendered, and in full of all claims to date, \$200.

"The above is correct.

"JAMES HOGAN.

"I have personally examined all items in the above bill, and find them correct.

"J. T. BURNS."

"Charles F. Hanlon, Esq.

"Dear sir: Please pay out of any moneys coming to me out of the estate of J. H. Burns, deceased, after payment of

debts, expenses of administration, and claims against the estate, the above bill of two hundred dollars (\$200) to James

Hogan, and out of moneys coming to me which are not attached or claimed or interfered with by other parties.

“June 24, 1887.

“J. T. BURNS.”

“Whereas, certain moneys will in the future, in all probability, become due and payable to Joseph T. Burns out of the income of certain real estate now belonging to the estate of James H. Burns, deceased, and whereas, it is now difficult to state exactly at what time or when such moneys will be due or paid: Now, therefore, I certify that the foregoing bill of two hundred dollars (\$200.00) having been agreed upon as being correct by both James Hogan and J. T. Burns, that I will accept the foregoing order of J. T. Burns to pay such moneys out of said moneys coming to him in the regular way, after paying the expenses of the administration, commissions advanced or paid, and other claims against the estate, and other moneys required by law and the order of the court. The acceptance of said order is understood not to be holden against the undersigned personally in any way, shape, or manner, the order being accepted payable out of the moneys coming to J. T. Burns in said J. H. Burns' estate, and not claimed or affected by attachments or other claims.

“Dated San Francisco, June 24, 1887.

“CHARLES F. HANLON,

“Attorney for Executor.”

The date of the stated account (May 1, 1887) is between the date of the fourth note and that of the fifth, and counsel for appellant contends that the rejected papers tend to prove an accord and satisfaction of the first four notes, which amounted to \$270, besides interest. While I think an accord and satisfaction was not pleaded by defendant (*Sweet v. Burdett*, 40 Cal. 97; *Coles v. Soulsby*, 21 Cal. 47), yet, conceding that they were, there is nothing on the face of the rejected papers tending to prove that they were intended or accepted as satisfaction of any one of the notes; and there was no offer to prove by other evidence any such agreement or understanding, nor any offer to prove that either the stated account or the order on Hanlon had been paid (*Holton v. Noble*, 83 Cal. 7, 23 Pac. 58); nor is it pretended that any such payment

was ever made. Indeed, Mr. Hanlon testified that "there was no money coming to Burns. He is executor of his brother's estate." So that the condition upon which Hanlon accepted the order might never happen, and, if it should, it is not apparent that Hanlon was authorized to pay the money from the estate of James H. Burns, to which he appears to have borne no other relation than that of counsel for the executor. As the papers offered had no apparent tendency to prove either accord and satisfaction or payment, they were properly rejected. I think the judgment and order should be affirmed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

CLARKE v. WITTRAM.

No. 15,091; July 21, 1893.

33 Pac. 798.

Appeal.—An Order Setting Aside a Default and permitting a defendant to plead after the time allowed by law has elapsed will not be set aside unless the court abused its discretion.

APPEAL from Superior Court, City and County of San Francisco; Walter H. Levy, Judge.

Action by Alfred Clarke against Hannah Wittram and others. From an order setting aside a default and permitting said Hannah Wittram to plead, plaintiff appeals. Affirmed.

Alfred Clarke in pro. per; Dunne & McPike for respondent.

PER CURIAM.—This appeal is from an order setting aside a default, and permitting one of the defendants to plead after the time allowed by law had elapsed. We have examined the transcript and find no abuse of discretion on the part of the trial court.

Order affirmed.

PEOPLE v. MUNROE.*

No. 20,973; July 25, 1893.

33 Pac. 776.

Forgery—Order for Teacher's Salary.—Since the Assignment by a public school teacher of salary not yet earned is void, the false making of such an instrument does not constitute forgery. But if the instrument containing such intended assignment contain likewise a guaranty of payment of the sum assigned, and a provision that, if the sum is not collected by a certain time, it will be paid by the assignee, it is valid in part, and hence is a subject for forgery.

Criminal Trial—Reading Evidence from Preliminary Examination.—Where a witness telegraphed and wrote to the district attorney from another state that, owing to business engagements in that state, he could not be present at the trial, which began about twelve days thereafter, and the return to a subpoena for such witness was that he could not be found within the county, there was a showing of such "due diligence" as justified the reading at the trial of his evidence taken at the preliminary examination before a committing magistrate, under Penal Code, section 686, providing for the reading of such evidence upon its being satisfactorily shown to the court that the witness "with due diligence cannot be found within the state."

Forgery—Witness Refreshing Memory.—On a Prosecution for Forgery, where the prosecuting witness states that he was present when the complaint was drawn by the district attorney, that they compared the copy therein of the instrument alleged to have been forged with the original, and that such copy was correct, it is proper, if the original is in defendant's possession, and he refuses to produce it after notice so to do, to allow the witness to refresh his memory as to the original by reference to the copy in the complaint.

Witnesses.—Where a Part of an Answer is not Responsive to the question, and a part is directly so, but the whole is relevant, material, and competent, it is proper to refuse to strike it out as being irrelevant, immaterial, and incompetent, and as being irresponsible to the question.

Forgery—Witness Refreshing Memory.—On a Prosecution for forgery, a witness testifying as to the forged instrument cannot refresh his memory by reference to the copy contained in the information, which he does not, of his own knowledge, know to be correct.

Municipal Corporations.—An Order Drawn Directly on a City, instead of on the auditor thereof, is not void on its face.

*For subsequent opinion in bank, see 100 Cal. 664, 38 Am. St. Rep. 323, 24 L. R. A. 33, 35 Pac. 326.

Forgery — Indictment — Variance.—Where an information for forgery sets out the forged instrument as an order addressed to a city, the fact that it was in reality addressed to the auditor of the city does not constitute a variance.

APPEAL from Superior Court, Los Angeles County; B. N. Smith, Judge.

George Munroe was convicted of forgery, and appeals. Affirmed.

W. T. Williams and Wm. E. Cox for appellant; W. H. H. Hart, attorney general, for the people.

HAYNES, C.—The defendant was convicted of forgery, and this appeal is from the judgment and from an order denying his motion for a new trial. Appellant's principal contention is that the information does not state facts which constitute a public offense, for the reason that the forged instrument would, if it were genuine, be void upon its face. Said instrument is as follows:

“No. 78. Los Angeles, Cal., Feb. 1, 1892.

“To the city of Los Angeles, Cal.:

“Please deliver to the State Investment Co., or order, my warrant upon the treasurer of said city for the month of February, 1892; and I hereby authorize the State Investment Co., or order, to receipt for and collect the sum of \$80 due me as teacher; and, for value received, I hereby sell, assign, and set over to the State Investment Co., or order, the sum of \$80, with interest at the rate of ten per cent. per month from March 2, 1892, and I guaranty payment of the above-stated amount on or before March 2, 1892, authorizing the State Investment Co., or order, to collect any warrants drawn in my favor until the amount of this claim and interest are paid in full, and, in case suit is instituted, to collect this claim or any portion thereof, I promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said suit.

“[Signed] HELEN HENRY.”

The information charges that defendant forged said instrument with intent to defraud one J. W. Jackson, to whom he transferred it by indorsement.

It is well settled in this state and elsewhere that the indictment or information must show that the forged instrument is such that, if genuine, it could be made available in law to work the intended fraud or injury; that, if it is a nullity upon its face, no case is made, unless by averment it can be shown how it could be made to operate injuriously or fraudulently: *People v. Tomlinson*, 35 Cal. 506; *People v. Ferris*, 56 Cal. 445; *Ex parte Finley*, 66 Cal. 262, 5 Pac. 222. It is also well settled that the unearned salary of a public officer is not assignable, because against public policy, and that any instrument intended to operate as such assignment is void: *Bangs v. Dunn*, 66 Cal. 72, 4 Pac. 963; *Bliss v. Lawrence*, 58 N. Y. 422, 17 Am. Rep. 273. This principle, however, is not confined to those commonly called "public officers," though we think teachers in the public schools may be properly designated as such. Their employment is a public one, made under the authority of law, and their compensation is paid out of public funds provided by law for that purpose: See Pol. Code, secs. 1696-1704. In *Arbuckle v. Cowtan*, 3 Bos. & P. 328, quoted with approval by the court of appeals of the state of New York in *Bliss v. Lawrence*, supra, it was laid down as a general principle "that all such profits as a man receives in respect to the performance of a public duty are from their very nature exempt from attachment and incapable of assignment." The attorney general, on behalf of the people, does not controvert either of the foregoing propositions, but contends that the instrument in question is something more than an assignment of the unearned salary of a teacher; that it contains a guaranty of the payment of the moneys there mentioned; that Helen Henry had a right to make such guaranty; and that it could be legally enforced. This contention we think is sound, and must be sustained. There is nothing criminal in the assignment of the unearned salary. It is simply void because it is against public policy. The officer whose duty it is to draw the warrants for teachers' salaries was not bound to regard the assignment, or to issue the warrants to the assignee. Notwithstanding the assignment he could, without creating any liability against himself or the city, issue the warrant to the teacher. This would seem to have been a contingency understood or anticipated, and as a protection to the assignee the guaranty was inserted. The test

is, could an action have been maintained against Helen Henry for the recovery of the warrant if the instrument had been genuine? The instrument admits that she has received value for the assignment of her warrant for the month of February. The warrant, if earned, would be for the sum of \$80; but interest on that sum at ten per cent per month from March 2, 1892, is promised if the money is not then paid, and there is the further express promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees in case suit is instituted to collect the claim. There are many cases where money paid upon an illegal contract may be recovered. In contracts which contemplate the performance of some act involving moral turpitude and therefore *malum in se*, no action can be maintained by either party to the contract. But this is not that case. It is not out of special regard for the officer as an individual that the assignment is held void, but for the protection of the public by securing to the officer that compensation without which he may be unable to discharge the duties of his office. But he is not prevented from incurring personal obligations, nor from devoting his salary when received to the payment or discharge of such obligations. Credit may be given him or money loaned to him upon the promise to pay out of his salary when received, and a written agreement so to pay is not illegal. The fact that payment was attempted to be secured by an assignment of the warrant, such assignment being void, does not affect the validity of the guaranty or promise to pay the amount. When a salary warrant is issued, it is assignable, and the assignee may collect or receive payment of the warrant; and it will be observed that the guaranty is not that the warrant will be issued to the assignee, but is for the "payment of the above-stated amount." Upon the face of the instrument the transaction appears to be an advancement or loan of \$80, to secure which the borrower assigns her unearned salary for the month of February, authorizing her assignee to receive the warrant and collect the money thereon, but providing that, if the money is not collected on or before March 2d, that she will pay the amount, and, as a further security, authorizes the assignee to collect other warrants drawn in her favor "until the amount of this claim and interest are paid in full." The assignment is void,

but the debt and obligation to pay is legal and binding, and therefore the subject of forgery.

A large number of exceptions were taken to rulings of the court upon the admission of evidence, several of which are argued by appellant's counsel.

J. W. Jackson, the prosecuting witness, was not present at the trial, and his testimony taken before the examining magistrate was read in evidence to the jury. It is insisted by appellant that the preliminary evidence offered by the district attorney did not show that Jackson was absent from the state at the time of the trial. This evidence consisted of a telegram from Jackson to the district attorney, dated at Kansas City, Missouri, September 30, 1892, in reply to a telegram from the district attorney addressed to him at that place, and two letters, the first postmarked Kansas City, September 22, 1892, and the second postmarked at the same place, October 13, 1892, in each of which he said it was impossible for him to come to California on account of business relations he had formed, and expressed regret that he could not do so. A subpoena for this witness was duly returned by the sheriff of Los Angeles county that the witness could not be found within his county. Upon this evidence the testimony of the witness Jackson, taken upon the examination of appellant before the committing magistrate, was received. Section 686 of the Penal Code provides that such testimony may be read upon the trial "upon its being satisfactorily shown to the court that he (the witness) is dead or insane, or with due diligence cannot be found within the state." The actual absence of the witness from the state is not required to be shown, but it must appear that he cannot with "due diligence" be found within the state. We think due diligence was shown. During the ten or eleven days intervening between the date of Jackson's last letter and the time of the trial it was possible for him to have come within the state, but it certainly could not have been necessary for the people to have placed a guard upon every line of travel into the state to enable them to satisfy the court that he could not be found within it.

The instrument alleged to have been forged, a copy of which appears to have been set out in the complaint in the justice's court, was not produced upon the examination. The witness Jackson (whose testimony taken upon the examination before

the magistrate was being read to the jury) had stated that he was present when the complaint was drawn by the district attorney, that they compared it, and that the copy in the complaint was correct; whereupon the justice said to the witness: "You may go on and state, refreshing your recollection as you please, the contents of that instrument." Upon the reading of this testimony in the superior court, appellant's counsel objected to the above direction given by the justice to the witness, and the testimony of the witness following, which appears to have been a reading of that portion of the complaint. The superior court overruled the objection, and permitted the testimony in relation to the contents of the paper to be read to the jury. The direction of the justice was too broad, but it does not appear that the witness improperly refreshed his recollection. He was present when the copy was taken from the original; assisted in comparing it. The copy thus made was competent as secondary evidence of the contents of the original, the original, after it was copied, having gotten into the possession of the defendant, and was not produced, though its production was demanded. We think the superior court did not err in overruling appellant's objection.

A part of an answer given by the witness was not responsive to the question, and a part was directly responsive. Appellant moved to strike out the answer on the ground that it was irrelevant, immaterial and incompetent, and also that it was not responsive to the question. The first objection was properly overruled, as the whole of the answer was relevant, material, and competent; and the second objection was also properly overruled, as the motion went to the whole answer, and part of it was directly responsive to the question.

Thomas F. Smith, deputy city auditor of the city of Los Angeles, was called for the prosecution, and testified that he saw the Helen Henry order in the office of the city auditor; that Mr. Jackson had it; and that a warrant was drawn in favor of Helen Henry, and delivered to Jackson. Upon cross-examination he testified that "the orders were addressed to the city auditor and city treasurer—to both." Upon redirect examination the witness said: "I do not remember whether the word 'auditor' after the words 'to the city' was written or printed in. I think it was there." At this point in the re-examination of the witness, the deputy district attorney

showed the witness the information containing a copy of the forged instrument, with the request, "Now look at this." Defendant's counsel objected that it was not a paper that the witness saw or executed or made, and that it was nothing by which the witness could refresh his recollection; to which the attorney for the people replied: "It don't make any difference. It is a paper proven to have been an exact copy of the original." The court overruled the defendant's objection, and permitted the witness to examine the copy contained in the information, and thereupon the witness further testified: "As I stated, I thought the word 'auditor' was written in there, but I would not be positive. I would not like to swear that it was or was not, but at the same time I thought it was there. These forms are gotten out in that way. I thought it was there because it was customary to put it there." The mode adopted by the prosecution in the re-examination of this witness was most extraordinary, and the court erred in permitting it. An inspection of the writing set out in the information could not by any possibility refresh his recollection. It might lead him to distrust his memory, or convince him that he was mistaken, but, if so, it could only be because he relied upon the statement of another that "it is a paper proven to have been an exact copy of the original." It was for the jury to say whether the forged instrument was correctly set out in the information, and counsel had no right to assume, for the purpose of affecting the testimony of the witness, that it was proven to be a correct copy. The means which may be used to refresh the recollection of a witness, as embodied in section 2047 of the Code of Civil Procedure, has long been the settled law, and there are no precedents to the contrary. The question remains, however, whether the defendant was prejudiced by this error. If the alleged variance between the instrument as set out in the information and the original was material, the error was prejudicial; otherwise it was not. The defendant, as he had a right to do, assumed two apparently inconsistent positions. He contended that the instrument as set out in the information, being addressed to the city of Los Angeles, and not to the auditor, was for that reason void; and that the original was in fact addressed to the auditor, and therefore was a different instrument from that for the forgery of which he was being tried, or, in other words, that

there was a variance between the information and the proof. An immaterial variance must be disregarded. There are two aspects in which the variance in this case must be considered: (1) As to whether the validity of the instrument, if genuine, was affected; and (2) whether, if the forged instrument was addressed to the auditor, as the defendant sought to prove, a conviction or acquittal upon the information in this case could be made available as a bar to another prosecution upon an information in which the instrument should be shown to be addressed to the auditor.

1. As to the validity of the instrument as set out in the information, the defendant requested the court to charge the jury that "an order drawn directly on the city of Los Angeles, and not drawn on the auditor of said city, is void on its face, and could not be enforced." This instruction was refused by the court, and we think correctly. The auditor is but the agent of the city. A corporation can only act by or through its officers, who are its agents. The address to the city was quite sufficient, and fully authorized the auditor to act.

2. We see no ground upon which it could be successfully contended that a conviction under this information would not bar a prosecution upon the instrument in question if it should afterward appear that it was in fact addressed to the auditor, and a new information should so charge it. Wharton, in his work on Criminal Pleading and Practice (section 173), says: "The great rigor of the old English law in this respect was one of the consequences of the barbarous severity of the punishment imposed. A more humane system of punishment was followed by a more rational system of pleading."

The order in question was for the salary of a certain person for the month of February, 1892, to the State Investment Company, indorsed by the defendant to J. W. Jackson, and a warrant was in fact issued thereon to Jackson. It is the order upon which a warrant was issued to Jackson for the salary of Helen Henry for the month of February, 1892, for the sum of \$80, which the defendant has been found guilty of forging. It is not like the case of a counterfeit bank bill, where a letter or a figure may be the only means of distinguishing it from thousands of others of the same denomination purporting to be issued by the same bank. In *People v. Hughes*, 29 Cal. 258, the defendant was charged with arson, committed to defraud

an insurance company. In the indictment the insurance company was named the "Hartford Insurance Company." The name as proved on the trial was the "Hartford Fire Insurance Company." The court said: "It is sufficient to say that, under our practice, this is no ground for the arrest of judgment": Page 262. This remark was made independently of the section of the practice act which also justified the conclusion of the court. In *People v. Phillips*, 70 Cal. 61, 11 Pac. 493, the information alleged the forgery of a promissory note described as payable "to H. C. Philips, or order." The note given in evidence did not contain the word "to." Held, the variance was immaterial: See, also, *People v. Tonielli*, 81 Cal. 275, 22 Pac. 678. As the omission of the words "city auditor" was not essential either to the validity of the instrument or its identification, we must hold, both upon principle and authority, the error under consideration was not prejudicial.

Other rulings upon evidence are assigned for error, most of which are mentioned only by number, and are not discussed. We have, however, examined the whole record, and find no error which would justify a reversal. The exceptions to the instructions to the jury given and refused have been sufficiently covered in the foregoing opinion. We advise that the judgment and order appealed from should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

LIPPERT v. LASAR et al.

No. 14,923; July 31, 1893.

33 Pac. 797.

Mechanics' Liens—Time for Filing—Completion of Work.—A contractor agreed to excavate a cellar, and to erect walls of concrete and steps to the street, and plaintiff did work thereon for said contractor. The work was accepted by the owner as complete, July 26th; but in August a carpenter employed by the owner placed a

frame in the cellar door, and plaintiff, at the owner's request, filled a small hole outside of the cellar. Held, that the lack of this additional work was a "trivial imperfection," within the meaning of Code of Civil Procedure, section 1187, which provides that such imperfection shall not prevent the filing of the lien claim, and hence the filing of the claim August 29th was not within the statutory time of thirty days from the completion of the work.

APPEAL from Superior Court, City and County of San Francisco; F. W. Lawler, Judge.

Action by John Lippert against L. Lasar and others. From an order granting a new trial, plaintiff appeals. Affirmed.

D. E. Alexander and E. I. Robinson for appellant; John T. Humphreys and E. D. Peixotto for respondents.

VANCLIEF, C.—Action to enforce a lien upon a house owned by defendant Lasar for labor done upon an addition to said house for the defendant Sonneckson, who, as original contractor, constructed said addition. The judgment was in favor of the plaintiff, but the court granted a new trial, and this appeal is from the order granting a new trial.

Whether or not the plaintiff had filed his claim of lien within thirty days after the completion of the additional structure was the principal question at the trial, and is the only question presented on this appeal; it being admitted that the new trial was granted on the ground of insufficiency of the evidence to justify the finding that plaintiff's claim of lien was filed within the time required by section 1187 of the Code of Civil Procedure, namely, within thirty days after the completion of the addition which the original contractor agreed to construct. The claim of lien was filed August 29, 1890, and I think a decided preponderance of the evidence is to the effect that the addition was completed on July 26, 1890. The addition to the house was a cellar under it. By the original contract, which was in writing, the defendant Sonneckson agreed to make the necessary excavation for the cellar, and to construct walls of concrete seven feet and six inches in height and steps to the street for \$365. That all this work was done and accepted by the owner as completed on or before July 26, 1890, there is no controversy; but the evidence shows that the placing of a door frame in the cellar

door by a carpenter employed by the owner, and about an hour's work by plaintiff, at request of the owner, in filling a small hole outside of the cellar, was done in August. The court, however, considered the lack of this additional work a trivial imperfection in the improvement, if imperfection it was, in the sense of section 1187 of the Code of Civil Procedure, and not such as would have prevented the filing of plaintiff's lien within thirty days after July 26, 1890; and the evidence contained in the record seems to justify this conclusion. I think the order granting a new trial should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order granting a new trial is affirmed.

CLEARY v. FOLGER.

No. 15,103; August 10, 1893.

33 Pac. 877.

Vendor and Vendee—Rescission.—Where the Vendee of Land Notifies the vendor that he cannot and will not complete the purchase, the vendor need not offer to perform, and by failing to do so does not authorize the vendee to consider the contract as rescinded, so that he can recover the payments made by him.

Appeal—Law of Case.—The Fact That on an Appeal from a judgment of nonsuit the court treats certain facts as established does not make these facts the law of the case, so that defendant cannot on a new trial prove a different state of facts.

Nonsuit.—A Judgment Against Plaintiff at the Close of his evidence on the ground that he has not made out his case is a judgment of nonsuit, though part of the evidence introduced by him was a stipulation with defendant which provided that it could be used as evidence by either party.

Specific Performance—Damages.—The Withdrawal of Defendant's Cross-bill for specific performance would not estop him to claim damages under the prayer of his answer.

Vendor and Vendee.—Allowing Defendant to Prove Damages because of plaintiff's failure to complete his purchase is harmless error where he was not allowed to recoup for the reason that plaintiff did not make out his case, and there was therefore nothing against which defendant could recoup.

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Michael Cleary against J. A. Folger, Jr., to recover an installment paid on a contract for the purchase of land. Judgment for defendant. Plaintiff appeals. Affirmed.

B. McFadden for appellant; R. M. Fitzgerald and F. S. Stratton for respondent.

TEMPLE, C.—This is the second appeal in this case: Cleary *v.* Folger, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280. The former appeal was from a judgment of nonsuit, and the judgment was reversed and the cause remanded for trial. In the lower court the defendant amended his answer, adding a claim for recoupment against the demand of plaintiff. On the last trial the defendant proved and the court found that before the time for performance arrived, according to the terms of the contract, plaintiff had notified defendant that he could not and would not complete the purchase or pay anything further on account thereof. The court therefore held that defendant was excused from offering to perform, and had not made default, and had not, therefore, authorized plaintiff to consider the contract rescinded. The evidence justified this conclusion, and, of course, it follows that plaintiff cannot maintain his action.

The appellant contends that certain facts were considered by this court as established on the first appeal, and that it was error to allow such facts to be controverted at the trial, as they had become the law of the case. But in this contention appellant's counsel entirely misapprehends what is meant by the "law of the case." That doctrine is merely that when this court has decided that from the facts presented by the record certain legal conclusions follow, such legal conclusions must be accepted by the parties upon a retrial, if the same facts are again established. This will not prevent the par-

ties, however, from proving an entirely different state of facts upon the retrial, and, in so far as the facts proven are different, the case will not be controlled by the first decision. As the first appeal was from a judgment of nonsuit, which this court held was erroneous, it would necessarily follow that the defendant should then have an opportunity of putting in his case. The former decision was merely that, taking plaintiff's evidence as true, it made a *prima facie* case for plaintiff. But plaintiff maintains that the first judgment was not a judgment of nonsuit, because, he says, plaintiff put in evidence a stipulation as to certain facts, in which it was stipulated that it could be used by either party. This, he says, constituted evidence for the defendant, which he claims would prevent a nonsuit and necessitate a judgment on the merits. Conceding the rule to be as claimed, still there is nothing in this contention. All the evidence put in by plaintiff is available to defendant as evidence for him, and it makes no difference whether plaintiff proves his case by testimony or by admissions and stipulated facts. If, when he has put it in, it does not make out his case, a nonsuit is proper. The first judgment was strictly a judgment of nonsuit.

On the last trial defendant put in evidence tending to show damage because of the failure of plaintiff to complete the purchase. This was objected to by plaintiff, and is here assigned as error. Counsel says he cannot comprehend how damages can be recovered for the breach of a stipulation in a contract which has been canceled by mutual consent or has been abandoned by both parties. How can there be a right of action upon a contract which has become nonexistent, and when, because it has become nonexistent, payments made upon it are without consideration, and may, therefore, be recovered as money had and received to the use of the payer? Of course, under such circumstances, no such action could be maintained, and I think it hardly fair to say that it has ever been so held in any authoritative decision. No such claim was asserted on the former appeal, and no such question was before the court. The remarks alluded to were evidently made in momentary forgetfulness of the main idea advanced in the opinion, to wit, that the contract had been abandoned and canceled. In none of the subsequent cases in which the suggestion is cited with apparent approval was any such

question involved, and all that is said is plainly obiter: See *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749; *Newton v. Hull*, 90 Cal. 487, 27 Pac. 429; *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774. In each of these cases the citation is rather to the doctrine, coupled with the statement in regard to recoupment, to the effect that, when both parties have failed to perform the contract, either may elect to consider it rescinded and recover moneys paid upon it. But if such be the law of this case, it would justify the admission of the evidence complained of, unless there be other grounds of objection. Plaintiff claims that such ground there is, because the defendant had by consent dismissed a cross-complaint, in which he asked for specific performance of the contract, each party paying his costs; and he cites as authority for the proposition *Merritt v. Campbell*, 47 Cal. 542, and *Parnell v. Hahn*, 61 Cal. 131. Notwithstanding these authorities, I think it is at least doubtful whether the mere withdrawal of the claim to equitable relief under the circumstances can operate as an estoppel upon defendant's right to claim damages. It left defendant still an answer in which he claimed damages, to wit, the installment paid. In one point of view the decision may be understood as holding that, while defendant cannot retain the installment as liquidated damages, he may retain sufficient to cover actual damage. But defendant did not recover any damage under this plea, the court holding that the agreement had not been canceled or abandoned, and that, therefore, plaintiff could not recover the installment paid, and there was, therefore, nothing against which a recoupment could be made. It would seem to follow that before plaintiff can complain of this evidence as injurious error he must show his right to recover the money he had paid. As we have seen, he did not make out such a case, and therefore, whether the ruling were right or wrong, he was not injured. I think the judgment and order should be affirmed.

We concur: Vanclef, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

CLARKE v. MOTT et al.

No. 15,153; August 10, 1893.

33 Pac. 884.

Insolvency.—Evidence That a Debtor, When Called on to Pay his notes when due, replied that he was unable to pay them; that he had tried to raise the money, but could not—warrants a finding that he was insolvent.

APPEAL from Superior Court, City and County of San Francisco; Walter H. Levy, Judge.

Petition of C. W. Mott and others to have Alfred Clarke adjudged an insolvent debtor. From an order so adjudging him he appeals. Affirmed.

Witnesses Hutton and Stewart both testified that, when demand was made on Clarke for the payment of certain of his notes, he replied that he was unable to pay them; that he had tried to raise the money and was unable to do so.

Alfred Clarke in pro. per. (Naphtaly, Friedenrich & Ackerman of counsel) for appellant; Wilson & McCutcheon, Page & Eells, W. T. Baggett and Warren Olney for respondents.

PER CURIAM.—This is an appeal by Alfred Clarke from an order of the superior court adjudging him to be an insolvent debtor. We can discover from the record only two points legitimately before us: (1) Did the court err in overruling the demurrer to the petition? And (2) does the evidence warrant the finding of appellant's insolvency? As to the first point, appellant has pointed out no defect in the petition, and we see none. As to the second point, the facts testified to by the witnesses Hutton and Stewart clearly show the insolvency, not considering the nineteen attachments. The order appealed from is affirmed.

MENDENHALL v. ROSE.

No. 15,058; August 10, 1893.

33 Pac. 884.

Real Estate Agent—Commissions—Written Contract.—**R.** Wrote a Broker that, "if there is any possibility of selling both or either piece of property, see if you can make it this week. . . . Also V. told me S. told him he had a man who wanted Hoza Bernal's place. . . . You had better see S., and get hold of the buyer, . . . for if V. finds out who it is he is bound to spoil the sale. . . . In case you make a sale of the 29½ acre piece," a certain mortgage can remain on the place for one year. "Also the Ratke place, there can be" a mortgage for one year or longer. Held, that such letter did not authorize such broker to sell real estate situate in the county of A., "generally known as the 'Jose Reyes Bernal Rancho,'" or any other real estate, and was inadmissible in an action by such broker against R. for services in selling such real estate, under Civil Code, section 1624, subdivision 6, which requires agreements authorizing or employing brokers to sell real estate for compensation to be in writing. Such letter was not rendered admissible by evidence by plaintiff which tended only to apply the description in the complaint to a particular one of Jose Bernal's several tracts, and did not show which one of such several tracts was intended by the expression "Hoza Bernal's place," in such letter.¹

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by William W. Mendenhall against Jason A. Rose to recover on a written contract for services rendered in the sale of certain real property. From a judgment for plaintiff, defendant appeals. Reversed.

D. M. Conner and Welles Whitmore for appellant; Lindley & Eickhoff for respondent.

¹ Cited and approved in *Proulx v. Sacramento Valley Land Co.* (Cal. App.), 126 Pac. 511, which says: "In short, a description of land sought to be sold under a broker's contract can be cured but not created by parol evidence."

Cited in *Sanchez v. Yorba*, 8 Cal. App. 494, 97 Pac. 206, as having no bearing on a case where the letter to the broker must be construed as authority to him to sell particular land at a particular price.

VANCLIEF, C.—It is alleged in the complaint in this action that by a written contract the defendant authorized and employed the plaintiff as his agent and broker to sell certain real property situate in the county of Alameda, “generally known as the ‘Jose Reyes Bernal Rancho,’ ” and agreed to pay plaintiff for his services as such agent and broker what said services were reasonably worth. That thereafter “plaintiff found and secured for defendant a purchaser at a price satisfactory to defendant of the real property aforesaid, to whom said defendant sold said property.” That the services so rendered by plaintiff for defendant were reasonably worth the sum of \$950, no part of which has been paid, and for which he prays judgment. The defendant answered, specifically denying the alleged contract, authorization, and employment, and also denying the alleged services. The court found the facts as alleged by plaintiff, and rendered judgment accordingly, and the defendant appeals from the judgment and from an order denying his motion for a new trial.

To prove the alleged authorization and employment, the plaintiff offered in evidence the following letter:

“Pleasanton, Nov. 30, 1887.

“W. Mendenhall, Esq.

“Dear Sir: If there is any possibility of selling both or either piece of property, see if you can make it this week. If it is not sold this week, by the first of next week I will have to buy it right out, or let it slide. Also Mr. Vandervoort told me Mr. Saulsbury told him he had a man who wanted Hoza Bernal’s place. I don’t think there is any truth in it, but if there is you had better see Mr. Saulsbury, and get hold of the buyer, and keep hold of him; for if Vandervoort finds out who it is he is bound to spoil the sale. This letter is private, and you will do me the favor to burn it as soon as you read it. In case you make a sale of the 29½ acre piece, there can be \$3,000 or \$4,000 mortgage remain on the place for one year. Also the Ratke place, there can be \$5,000 mortgage for one year or longer if the buyer or buyers so desire.

“Yours, truly,

“J. A. ROSE.”

Written in lead pencil on reverse: “P. S. There is no hurry about selling Bernal’s for a week or two. Sell the others first, if possible. R.”

To the introduction of this letter the defendant objected, on the grounds that it is not such an agreement in writing authorizing or employing plaintiff to sell real estate as is required by the sixth subdivision of section 1624 of the Civil Code; that it does not contain a description of the real estate which plaintiff was authorized to sell, nor refer to any other paper or writing containing such description; and that it is irrelevant, and does not tend to prove any allegation of the complaint. The court overruled defendant's objection, and admitted the letter as evidence, to which ruling the defendant excepted, and contends here that it was error.

I think defendant's objection should have been sustained, and, as this letter was the only written evidence offered of the authority or employment of plaintiff, the error in admitting it must be presumed to have been prejudicial to the defendant. The letter does not purport to authorize or employ the plaintiff to sell the real estate described by name ("Jose Reyes Bernal Rancho") in the complaint, or any other real estate; nor does it admit or acknowledge any prior authorization or employment to sell any real estate; nor does it purport to authorize a sale of "Hoza Bernal's place," wherever and whatever that may be; nor can authority from defendant to sell Jose Bernal's place be inferred from the letter, since such an inference involves the legal absurdity that defendant authorized and employed plaintiff to sell Bernal's property. The only object of the letter, to be inferred from its language, was to hurry a sale of the "29½" acre place and the "Ratke place," from which the only legitimate inference is that defendant was interested in the sale of those, and understood that plaintiff had authority to sell them; nothing more. But from the merely incidental reference to "Hoza [Jose] Bernal's place" it cannot be inferred that defendant was interested in or had authorized the sale of that place. The language of the letter is perfectly consistent with a total want of the authority and employment alleged in the complaint. Besides, the letter contains no description of "Hoza Bernal's place," even by name, by which it could have been identified as the land described in the complaint as "certain real property situate in the said county of Alameda (generally known as the 'Jose Reyes Bernal Rancho')," without proving at least that Jose Bernal owned only one place, that this one place was situate in the

county of Alameda, and was generally known as the "Jose Reyes Bernal Rancho." The evidence on the part of plaintiff to identify "Hoza [Jose] Bernal's place" as the real estate described in the complaint was a failure. The plaintiff himself testified: "The land I have been testifying about is known as the 'Jose Reyes Bernal Rancho.' Jose Reyes Bernal had other tracts of land in this immediate neighborhood. I don't know whether this land is a portion of Augustine Bernal's ranch or not. I knew Bernal had other tracts of land in Alameda county. I don't know that they were all spoken of generally as the 'Jose Reyes Bernal Rancho,' 'Bernal Land,' or 'Bernal's Place.' He lived in this place, and this place was known by that name. Always spoken to me that way by Rose and other people. I have learned since that he did have other places. I did not know it at that time. I know this was called the 'Jose Bernal Place,' because this was his place of residence. When you spoke of it that way everybody knew what you meant. It was the largest tract he had. I have heard this place called the 'Jose Reyes Bernal Rancho' by different parties for a good while. Mr. Rose called it by that name. At that time Jose Bernal resided on the place." This testimony tends only to apply the description in the complaint to a particular one of Jose Bernal's several tracts, but has not the slightest tendency to remove the ambiguity of the letter. It still remains wholly uncertain which one of Jose Bernal's tracts was intended by the expression "Hoza Bernal's place"; and what the parties intended by that expression could not have been proved directly by parol evidence, but only indirectly by evidence of such extraneous facts as would remove the uncertainty and ambiguity as above indicated: *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179. For the error of admitting in evidence the letter of the defendant I think the judgment and order should be reversed and the cause remanded.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded.

PEOPLE ex rel. ATTORNEY GENERAL v. SAN FRANCISCO PUBLIC STOCK EXCHANGE.

No. 14,668; August 11, 1893.

33 Pac. 785.

Corporations—Annulment of Charter.—The Complaint in an action to annul the charter of a corporation, for conducting a business in violation of the laws against lotteries and gambling, should clearly and distinctly allege its illegal acts.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by the people of the state of California, upon the complaint and information of the attorney general, to annul the charter of the San Francisco Public Stock Exchange. Judgment for defendant. Plaintiff appeals. Affirmed.

Attorney General Hart for appellant; Davis Louderback for respondent.

HAYNES, C.—Appeal from a judgment upon demurrer to the complaint. The complaint alleges the incorporation of defendant, and sets out its articles of incorporation, constitution, and by-laws in full. Its business, as shown by its articles of incorporation, is to buy and sell stocks, bonds, and securities. Except as to one feature, the mode of conducting its business is the same as that of other exchanges with which the public are familiar, so far as appears from its constating instruments, and that is that it permits the use of the phonograph in making orders, offers, and bids. These offers or bids may be spoken into the private phonograph of the person making the bid or offer, or into phonographs kept by the exchange for that purpose in adjacent rooms, and the cylinders containing these bids are placed upon a table in the exchange room, and afterward placed in the “main phonograph” consecutively, in the order in which they are received, and publicly announced; and the bid, offer or order is then placed upon the blackboard. The bid, offer or order must designate the member or broker who is to execute it, and the name of

the person making it, unless he directs it to be withheld. The by-laws provide, among other things not material to be noticed, that no fictitious sales or contracts shall be made, and that all stocks and securities must be delivered within thirty minutes after the close of the session. Orders, bids and offers may also be made orally or in writing, at the option of the party making them. The complaint charges that the mode of conducting business by the defendant is in violation of section 330 of the Penal Code, and in violation of the laws of this state, and of the ordinances of the city of San Francisco, "against conducting of lotteries, gambling, and games of chance, and is therefore illegal, and against public policy." It is conceded by appellant that the articles of incorporation, constitution and by-laws, upon their face, seem to be legitimate and proper; that there is nothing in the law which inhibits the buying and selling of stocks, bonds and securities, and that the proper use of the phonograph is not, in itself, objectionable. This being conceded, the complaint must be held insufficient, unless facts are alleged, showing either that defendant is not operating within its constitution and by-laws, or that while its constitution and by-laws may, upon their face, appear to be legal, the business done, though in conformity therewith, demonstrates their illegality. We do not find in the complaint any allegation tending to show either of such facts. While it is alleged that bids and offers are spoken into the phonograph without the hearing of members of the exchange or the public, and that no one knows the prices fixed until the same are announced through the main phonograph, it alleges that the bids and offers are consecutively announced through the main phonograph. No complaint is made of any wrong or injustice in making the announcements consecutively, nor do we see that any ground of complaint can be based upon the fact that no one can know of the bid or offer until it is announced, as that objection would be equally valid if all bids and offers were made orally. In appellant's brief the argument seems to be confined to the point that respondent's business, as conducted, is a lottery. We see in the complaint no statement of any element of chance, except that which inheres in all speculative business of like character. It is said in appellant's brief that "by a close perusal [of the complaint] it is seen that nothing of substance is either bought

or sold." In a complaint seeking to annul the charter of a corporation, or to end its business by a perpetual injunction, the allegations of misuser ought to be so clear and distinct as to be seen without resorting to a close perusal. We can discover no averment of any fact showing that respondent's business is not conducted in conformity to its charter, constitution and by-laws, or wherein it violates any provision of the Penal Code. The judgment appealed from should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

PEOPLE v. FAGAN.

No. 20,938; August 15, 1893.

33 Pac. 846.

Larceny—View by Jury.—On a prosecution for the larceny of cattle, it is error for the court, jury, counsel and officers of the court to go to a neighboring corral to examine the brands on certain cattle, when such examination is not conducted as a part of the regular trial—neither the cattle nor the brands being offered in evidence, nor defendant given an opportunity to object—since Penal Code, section 1119, authorizing the court to order the jury to be conducted to the place in which the offense was committed, or other material fact occurred, does not apply to such case.

APPEAL from Superior Court, Stanislaus County; William O. Minor, Judge.

Frost Fagan was convicted of the larceny of cattle and appeals. Reversed.

James H. Budd, L. J. Maddux and Robt. Farrell for appellant; Attorney General Hart and L. W. Fulkerth, District Attorney (T. A. Coldwell of counsel) for the people.

TEMPLE, C.—The defendant was indicted jointly with his father, whose appeal was recently disposed of here (People

v. Fagan, 98 Cal. 230, 33 Pac. 60), and William Ducker. They had separate trials and the cases, as presented in the record, differ widely. By this record it appears that one F. Weyer had about two hundred head of cattle on the Booth ranch, in the county of Stanislaus, twenty-two miles west of Modesto. On the second day of October, 1891, twenty-one head were missing. Nothing was known as to the mode or cause of the disappearance, but on the 8th or 9th of the same month seven animals were found by William Grummett on the Howard ranch. Grummett had charge of Howard's stock and had some belonging to himself. At the suggestion of Howard, he put the strays in with his own. On the 13th, four more animals appeared, and were taken by Grummett. Howard, on the 16th of the month, having heard of Weyer's loss, notified Purvis, sheriff of the county, of the presence of the cattle. On the next day, Purvis and McGinnis, a deputy constable who was looking for the cattle, and had offered a reward for their recovery and the apprehension of the thief, supposing them to have been stolen, went to Howard's ranch, and examined them. The animals had been freshly marked and the brands altered. The marks were a crop off one ear and an underslope of the other. Weyer's brand consisted of a mark resembling a capital L, when turned one way, and, inverted, resembled the figure 7. The cattle were thus branded. It had been changed by connecting the horizontal line with the perpendicular mark at each end, making it a square. Thus altered, both marks and brand bore a close resemblance to the marks and brand used by the defendant. The sheriff told Grummett to keep the cattle until some one called for them, and then immediately notify him. These cattle were subsequently identified as a portion of the twenty-one head which had been lost by Weyer. Defendant lived with his parents at Modesto. His father had recently taken up some land in the Coast Range, about nine miles from Howard's, intending, as he said, to homestead it. His father had a small cabin there, and had gone there about the 1st of October. Defendant's witnesses testified to facts which, if true, proved that defendant was at home on the night of the 2d of October, and also on the 3d and 4th of that month. Defendant had cattle of his own, and, according to his testimony, on the 14th of October drove some fifteen head into the Coast

Range near his father's cabin, and remained there at his father's place until his arrest, on the 20th. On the 18th, Grummett visited the Fagan cabin, and told defendant about the eleven head which were at Howard's, describing their marks and brands, when, according to Grummett's testimony, defendant said they were some cattle he had recently purchased and re-marked, and said he would take them away. Defendant, on the stand, denied having said that he had recently bought or marked any cattle, and said he knew nothing of the cattle lost by Weyer. He had neither taken nor marked any of them. He said, however, he had lost some of his cattle and was looking for them. He testified that ten head of his were never found. The eleven head were taken from Howard's place on the 19th of October, about noon, while Grummett was at dinner. During the afternoon, Grummett missed them, and found that a gate which had been locked had been lifted from its hinges; that there were cattle tracks through the gate and also those of a horse. He telegraphed to Purvis, who came over that evening, bringing McGinnis with him. They, with Grummett, followed the tracks to a canyon leading into the Coast Range, called "Ingram Canyon." Three ravines, not far apart, led into the mountains. Washington canyon is the more northerly, then Curran canyon, and then Ingram. High ridges divide them from each other. They terminate near together at a mountain called "Oso," near which Grummett and his brother had a place. About 4 o'clock in the morning of the 20th they reached the Fagan cabin, where they found the eleven head in a corral within a few feet of the cabin. In the cabin they found the defendant and his father in bed, while William and Ed. Ducker were lying by the cabin on the outside. When asked by the sheriff if the cattle were his, defendant replied that they were not; that they were strays, and he did not know how they got into the corral. Charles Fagan said that he and Will Ducker put them into the corral, and that Frost knew nothing of it. At the trial, Ducker testified that defendant was cooking supper when the cattle appeared there, not driven by anyone, and muddied their spring, whereupon Charles Fagan and he put them into the corral. The defendant also said that he had about thirty head of cattle in the range, and some of the posse made search, and found two head near Mt. Oso, which were marked and branded in

the same mode as the eleven head. Afterward, November 21st, three more were found near Mt. Oso, three and one-half miles from the Grummett cabin. They were marked and branded similarly to the eleven head. They were taken to Modesto, and placed in Mr. Young's corral, and on the trial were identified as Weyer's cattle, and as having been missed on the 2d of October; but they were not part of the eleven head, with the larceny of which, it was assumed at the trial, defendant was charged.

The court required the prosecution to say whether they prosecuted the defendant for a larceny committed by the taking from the Howard place on the 19th, or from the Booth ranch on the 2d. The district attorney said he claimed that the taking was from the Booth ranch on the 2d. If, therefore, it can be said that the defendant was found in possession of the cattle at all, it was not until eighteen days after the taking; and it was only from the circumstances recited that it could be inferred that even then defendant had any possession or control of them, by himself, or jointly with his codefendants. And the evidence was conflicting as to the existence of every one of these circumstances, except the fact that the cattle were found in his father's corral while he and three others were at the cabin. It is impossible to make out from the statement in what respect the defense claimed that the marks and brands upon the cattle alleged to have been stolen differed from the defendant's marks and brands. But a great deal of evidence was put in upon the subject upon both sides, much of which consisted in illustrations upon the blackboard, or the examination of sensible objects, the force of which we cannot appreciate. To enable the jury to compare these marks and brands, there was exhibited to them, against the objections of the defense, a hide alleged to have been taken from an animal claimed by the defendant. It was not the hide of an animal alleged to have been stolen, but was exhibited merely to prove what the defendant's marks and brands were. I think the evidence insufficient to show that the hide was from a steer belonging to the defendant, or that it had not been tampered with, but I pass to what I deem a still plainer error.

After examining the earmarks upon the hide, the court, with the jury, clerk, sheriff, and counsel, went to Yoang's

corral to examine the three head which had been found, November 21st, near the Grummett place, in the Coast Range, of course for the purpose, in part, of comparing the marks with those upon the hide. These three animals the defendant was not charged in the information with stealing, nor was it shown, by direct evidence, at least, that he had ever seen them, or that he knew anything about them. This action of the court was against the objection of the defendant. This course is not authorized by section 1119 of the Penal Code. The cattle and the marks were not offered in evidence, so as to afford the defense an opportunity to object, nor had they the opportunity to call the attention of the jury to variances between the marks and those of the defendant. Upon this point, see *People v. Fitzpatrick*, 80 Cal. 539, 22 Pac. 215.

When the defendant was on the stand the following occurred: "Question. What is there about this hide? Answer. This hide? Q. Yes, sir. A. Well, I don't know whether it is the same bullock or not. Sam Miller sold a bullock that belonged to me. Mr. Fulkerth: We shall object to that, that it is immaterial what there is about that hide. They can dispute the conversation, if they want to. The Court: That is your hide. Mr. Ferral: What is there to this hide that has been offered in evidence? So he may have the right to explain any connection he has with it. The Court: I think that it is too general a question. I will sustain the objection. (The defense reserved an exception.)" I take it that the remark of the judge, "That is your hide," was merely intended to tell the witness that it was the hide offered in evidence. The question, with the explanation, which must be taken as a part of it, was not too general. It could hardly be made more specific without being objectionable. The objection made and sustained was that it was immaterial, as the defendant could only deny the conversation in which the defendant was reported to have said that the marks on the animal killed were his. The defense, having taken an exception, pressed the matter no further. What explanation could have been given, we do not know; but many possible ones may be imagined, which would have destroyed the entire value of the evidence, if believed by the jury. That the evidence was most material is evident. The identity of the marks and brands recently made on the cattle with the marks and brand

of defendant was the most important fact testified to for the people, and the exhibition of the hide and the marks and brands on the cattle in Young's corral was the most forceful evidence of the fact. For this reason the judgment and order must be reversed.

The exceptions to the instructions are mainly the same as those made in the recent case of *People v. Fagan*. In that case the court deemed it unnecessary to consider and determine these questions. It is not more necessary to do so in this case.

We concur: Vancielief, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

TOWN OF SANTA MONICA v. ECKERT et al.

No. 19,156; August 15, 1893.

33 Pac. 880.

Writ of Prohibition—Effect of Refusal.—Where a writ of prohibition is asked to restrain a court from proceeding on the ground that it has no jurisdiction, the denial of the writ, without any decision on such question, does not take away the right to have it considered on writ of review.¹

An Appeal cannot be Considered Where the Amount in Controversy, as shown by the *ad damnum* clause of the complaint, is less than the jurisdictional amount of the supreme court, and the "legality" of the license tax for which the action is brought is not questioned, but the contention is that a license already obtained covered the premises.

¹ Cited in *Hayes v. Board of Trustees etc.*, 6 Cal. App. 523, 92 Pac. 493, where it is said: "The writ of prohibition should not ordinarily issue where certiorari will lie, unless it appears that the applicant for the writ will necessarily be injured if the tribunal sought to be prohibited is permitted to proceed."

Cited in the dissenting opinion of Shaw, J., in *People v. Soto*, 8 Cal. App. 328, 96 Pac. 916, quoting the words used in the same connection by the court in *Hayes v. Board of Trustees etc.*, 6 Cal. App. 523, 92 Pac. 492.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by the town of Santa Monica against Robert Eckert and others. From a judgment of the superior court reversing a judgment for defendants, defendants appeal. Appeal dismissed.

Thomas B. Brown for appellants; Richard R. Tanner for respondent.

HAYNES, C.—This action was brought by the town of Santa Monica, a municipal corporation of the sixth class, in the recorder's court, to recover the amount of a license alleged to be due from the defendants for keeping a saloon, the amount of the license fee fixed by the ordinance being \$300. In the complaint, plaintiff alleged the amount required to be paid to be \$300, but remitted all in excess of \$299.99, for the avowed purpose of giving the recorder's court jurisdiction. Upon the trial in that court defendants had judgment, from which the plaintiff appealed to the superior court, and the trial in that court resulted in a judgment for plaintiff for said sum of \$299.99, and costs, from which judgment, and an order denying defendants' motion for a new trial, the defendants appeal.

The point principally relied upon by appellants for a reversal is that the superior court had no jurisdiction to entertain the appeal, because, as they contend, the recorder's court from which the appeal was taken had no jurisdiction. This contention is based on the fact that the ordinance of the town of Santa Monica fixed the amount of the license at \$300, a sum beyond the jurisdiction of that court, and that plaintiff could not legally remit any portion of that sum for the purpose of giving jurisdiction. After the appeal was taken to the superior court, the defendants applied to this court for a writ of prohibition to restrain the superior court from proceeding in the cause, upon the ground that it had no jurisdiction. The writ was denied, and respondent contends that the denial of the writ was an adjudication that the superior court had jurisdiction of the case brought into it by appeal. But that conclusion does not follow. It will not issue where

there is a plain, speedy and adequate remedy in the ordinary course of law: Code Civ. Proc., sec. 1103. In this case, if the superior court had jurisdiction, there could be no appeal from its judgment, as the amount demanded was less than \$300; but there was still left an adequate remedy by a writ of review. The writ of prohibition will not ordinarily issue where certiorari will lie, unless it appears that the applicant for the writ will necessarily be injured if the court sought to be prohibited is permitted to proceed at all, as that court may, before final judgment, discover its want of jurisdiction, and dismiss its proceedings; while, if it should proceed to final judgment, the party is not injured by the entry of a void judgment, and proceedings to enforce such judgment may be prevented, and the judgment declared void under a writ of review. The mere denial of the writ of prohibition, where the question of jurisdiction, as in this case, was not decided, does not take away the right to a writ of review. Defendants' answer raised no question as to the "legality" of the license tax, but only the question of their liability to pay it, upon the ground that they already had a license which covered both bars, and the answer was not verified, as required by section 838, Code of Civil Procedure: *Williams v. Mecartney*, 69 Cal. 556, 11 Pac. 186. As the legality of the license tax was not involved, and the amount in controversy, as shown by the *ad damnum* clause of the complaint, is less than \$300, this court has not jurisdiction of the appeal, and therefore cannot consider the question of the jurisdiction of either of the courts below. The appeal herein should be dismissed.

We concur: Temple, C.; Belcher, C.

McFARLAND and FITZGERALD, JJ.—For the reasons given in the foregoing opinion the appeal in this cause is dismissed.

DE HAVEN, J.—I concur in the judgment.

SANBORN et al. v. CUNNINGHAM et al.

No. 14,994; August 15, 1893.

33 Pac. 894.

Partnership—Purchases by Partner.—Plaintiffs, Having Taken a Crop of Barley under a mortgage of \$1,045, accepted the offer of C., one of defendants' firm, to take the crop, and pay them \$750 the following week. Soon after, plaintiffs received a check for \$500, drawn in favor of, and indorsed by, defendants. In a suit for the balance of the \$750, one of the plaintiffs testified that he told his partner to ship the barley to defendants; but it appeared that the warehouseman billed it to C., as he often did shipments from plaintiffs to defendants. Plaintiffs had charged defendants the \$750, and it appeared that the \$500 was the firm's money, and was charged to C. on their books. Defendants asserted that it was C.'s personal affair, and that he had bought the crop from the grower, who had directed him to pay plaintiffs the \$750 to release it. Held, that there was enough evidence to support a verdict against defendants for goods sold and delivered.

Partnership.—Plaintiff's Testimony That, in Answer to His Inquiry at the bank for a check which he wished to use as evidence, the cashier told him that he did not think plaintiff could get it, was competent, and there was no need to call the cashier to prove that fact.

Partnership.—Defendants Insisting That the Transaction was the Personal affair of one partner, a question by plaintiffs whether such transaction was in defendants' general line of business was proper.

Sale—Evidence.—In an Action for an Agreed Price, evidence of the value of the goods is irrelevant.

Chattel Mortgage.—Misnomer of the Mortgagor of Chattels (E. H. Wheeler for E. H. Walker) in the body of the affidavit is immaterial, where the mortgage purports to be made, and is signed, by E. H. Walker, as is the affidavit.¹

Evidence—Letters—Proof of Mailing.—Plaintiff testified that he had written certain letters to defendants; that the postage was prepaid and the letters put in the mail box at his store; that said box was emptied daily; that it was the business of W., an employee, to take the letters, and mail them in the postoffice. W. testified that he was such employee at the time in question; that it was his duty to take the mail to the office, and that he did so; that if any letter

¹ Cited in the note in 137 Am. St. Rep. 482, on the effect of failure to execute and record a chattel mortgage as prescribed by statute.

was addressed and put in the box, he took and mailed it. Held, sufficient proof of mailing to support secondary evidence of the contents of the letters.

Evidence.—An Entry in Plaintiff's Ledger, Which the book-keeper swears to be an original entry, if competent for nothing else, yet may be admitted to show with whom plaintiffs understood that they had dealt, and to whom they looked for payment.

Jury—Argument in Presence of.—It is within the court's discretion to allow the presence of the jury while counsel, in the course of argument, reads from the books.

Judgment—Overlooking Death of One Plaintiff.—Under Code of Civil Procedure, section 475, providing that no judgment shall be reversed or affected by reason of errors and defects not going to the substantial rights, a verdict and judgment in the name of the original plaintiffs, partners, overlooking the death of one of these, and the substitution of his executors, may be corrected, and are not ground for reversal.

APPEAL from Superior Court, Santa Cruz County; F. J. McCann, Judge.

Action by Lucius Sanborn and William Vanderhurst, executors of the will of Charles Ford, deceased, A. A. Morey and J. S. Menasco against J. F. Cunningham, James Dougherty and Henry L. Middleton, partners trading as J. F. Cunningham & Co., for the balance of an account for goods sold and delivered. Judgment for plaintiffs. Defendants appeal. Affirmed and amended.

Spalsbury & Burke for appellants; Julius Lee, for respondents.

HAYNES, C.—This action was brought by Charles Ford, A. A. Morey and J. S. Menasco, copartners in the name of Charles Ford & Co., against J. F. Cunningham, James Dougherty and Henry L. Middleton, copartners in the name of J. F. Cunningham & Co., to recover \$406.08, balance of an account for goods, wares and merchandise sold and delivered, alleging that the whole value of the goods sold was \$906.08, of which \$500 had been paid. The answer denied a sale and delivery to the defendants of goods, etc., of the aggregate value of \$906.08, or of any greater value than \$156.08, which last-named sum they admitted to be due and unpaid. Upon the first trial,

plaintiffs had judgment, and upon appeal the judgment was reversed, and a new trial ordered: *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. 403. Afterward, Charles Ford died, and Lucius Sanborn and William Vanderhurst, his executors, were substituted as parties plaintiff in his stead. The sum of \$156.08, admitted by defendants to be due, was for three lots of potatoes sold and delivered to them by Ford & Co. The remaining \$250 is part of the sum of \$750 agreed to be paid to Ford & Co. for a lot of barley, but whether the firm of J. F. Cunningham & Co., or J. F. Cunningham individually, is liable therefor, is the ultimate question. A jury was had, and resulted in a verdict against the defendants for the amount claimed.

The circumstances connected with the barley transaction are the following: E. H. Walker was indebted to Ford & Co. in the sum of \$1,045, and gave them a chattel mortgage upon his crop of barley, then growing, to secure said indebtedness. This barley, after it was harvested and threshed, was delivered to Ford & Co., and stored in a warehouse at Watsonville, in which town Ford & Co. conducted a mercantile business. The defendants, Cunningham & Co., were also merchants doing business at Felton, in the same county. On September 8, 1884, after the barley had been delivered to Ford & Co., J. F. Cunningham came to the store of Ford & Co., and said to Mr. Menasco, of the last-named firm: "I will take that Walker lot of barley; you have it shipped up right away; and I will send you \$750 the following week"; to which Mr. Menasco replied, "All right." Soon after this, Ford & Co. received a check or draft drawn by the Santa Clara Valley Mill and Lumber Company in favor of Cunningham & Co. on the First National Bank of San Jose for \$500, indorsed by Cunningham & Co., on account of the barley, leaving a balance of \$250 unpaid, which is the sum in controversy. Menasco testified that he instructed his partner Morey to have the barley shipped to Cunningham & Co., but it was billed by the warehouseman to Cunningham. Cunningham testified that in January, 1884, he bargained with Walker for his crop of barley, fifty acres at \$25 per acre; that Walker then owed him \$250, which was to be considered paid on the contract, and he was to pay the balance in money; that, in May, Walker said he wanted to reserve ten acres, and the amount to be paid was reduced to

\$1,000; that, a few weeks before the conversation with Menasco, Walker told him he had given a "crop mortgage" to Ford & Co., and that he should pay them \$750 on the barley. It further appears from the evidence that Ford & Co. charged the \$750 to Cunningham & Co.; that the \$500 remitted was the money of the last-named firm, and was charged to Cunningham. It also appeared that, for a year or more prior to the transaction relating to the barley, there had been more or less dealings between the two firms, and some, if not all, the shipments of potatoes making up the item of \$156.08 were shipped to Cunningham—that is, the shipping bills named him as the consignee. Some correspondence and other matters of evidence will be noticed in another connection.

It was urged upon the motion for new trial, and is urged here, that the evidence is insufficient to justify the verdict, in that it does not show the transaction to have been with the defendants as a firm or copartnership, but that it was the individual transaction of Cunningham; that the facts do not show a sale by Ford & Co., but that Cunningham bought the barley from Walker. Whether there was or was not a contract between Cunningham and Walker for the purchase and sale of the barley is immaterial. The barley was in possession of Ford & Co., and was delivered by them to defendants, or to Cunningham, upon the agreement that they should be paid \$750. Whether the defendants are liable, or whether Cunningham alone is liable, was submitted to the jury upon an instruction prepared by the defendants, which fairly presented the material questions of fact, and the jury found in favor of plaintiffs. The evidence was conflicting, but is sufficient to support the verdict. A large number of errors of law occurring upon the trial are also specified and argued by appellants.

1. Menasco's statement that "Morey ordered it shipped to Cunningham & Co.," if erroneously permitted to remain, did not prejudice defendants, as Morey afterward testified that he so ordered it. Besides, it did not appear, at the time the motion to strike out was made, but that the witness had personal knowledge of the fact.

2. The refusal of the court to strike out of Menasco's testimony the statement of the bank cashier that "he did not think it possible for me to get it," referring to the \$500 check

received by plaintiffs, was not error. The inquiry appears to have been made of the bank for the purpose of obtaining the original check as evidence. As the plaintiff had no right to make a personal search among the papers of the bank, the inquiry was proper, and it was not necessary to call the cashier to testify.

3. Whether the court erred in permitting the witness to testify to its contents is immaterial. There was no controversy between the parties as to its contents.

4. Defendants' objection to the following question put to plaintiffs' witness was properly overruled: "Question. Was this barley transaction with Cunningham & Co. in their general line of business?" The controversy was whether it was a transaction by defendants as copartners or by Cunningham individually. If the defendants dealt in grain, or especially in barley, it would tend to show that it was a partnership transaction. These two firms had had transactions with each other, and, if the transaction was within their general line of business, plaintiffs had a right to assume that he was acting as the agent of his firm. He was at least the ostensible agent in all transactions within the scope of their ordinary business, and, if he did not intend his firm to be charged with the transaction, Cunningham should have disavowed his agency for the firm.

5. One of plaintiffs' witnesses was asked upon cross-examination, "What was the value of that barley?" Plaintiffs' objection was properly sustained. The agreement was to pay \$750 for "the Walker barley." Nothing was said as to the quantity or value. Defendants received all of it, and were bound to pay the agreed price, regardless of its value.

6. Defendants' objection to the introduction in evidence of the Walker crop mortgage was properly overruled. The special objection urged was that it was void as to creditors, of whom Cunningham was one, because it was not sworn to by Walker, the mortgagor. This objection is based upon the fact that in the body of the affidavit the name "E. H. Wheeler" is written, instead of "E. H. Walker," thus: "E. H. Wheeler, the mortgagor in the foregoing mortgage named," etc. The mortgage purports to be made and is signed by Walker, and the affidavit is also signed by E. H. Walker. The error does not affect its validity.

7. The court overruled an objection made by defendants to oral evidence of the contents of certain written statements of accounts and letters which the witness stated had been addressed and mailed to defendants. Upon the former appeal, certain questions relating to the same statements of accounts and letters were considered: See *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. 403. It was there said: "The witness stated that he had no personal knowledge that the communications addressed to Cunningham & Co. were mailed, except that copies thereof appeared in plaintiffs' copy-book, and that it was a general custom of his firm to place letters in a box in the store, from which they were taken to the office. No foundation, therefore, was laid for the introduction of the evidence. Assuming that secondary evidence could, under such circumstances, be introduced, the press copies were the best evidence, next to the originals themselves." For that, and another erroneous ruling, the judgment in favor of the plaintiffs was reversed and a new trial ordered; and upon the second trial the same witness, after testifying as above in regard to writing the letters, and that the postage was prepaid and the letters put in the mail-box at the store, further testified: "This box was emptied daily. It was the business of Mr. White, then in our employ, to take these letters and deposit them in the post-office." Mr. White testified that he was employed by plaintiffs from 1883 to 1887; that during the fall of 1884 it was his duty to take the mail to the postoffice every night, and that he did so during September, October, November, and December, 1884; that if any letter was addressed and put in the box at the store during that time, he took it to the postoffice, and deposited it there in the United States mail-box, and that he also did so during March and April, 1885. We think this sufficient proof of the fact of mailing. Indeed, it is all the proof such a fact is capable of, unless in exceptional cases. Demand was made by the defendants for the production of the original letters and statements, and, the same not being produced, the witness was permitted to read the copies of the letters from the letter-press book. The statements were not copied in the book. There is no error in permitting this secondary evidence to be given.

8. Plaintiffs were permitted to give oral evidence of the contents of a letter written by Cunningham & Co. to Ford

& Co., September 25, 1884, over defendants' objection. The letter had been used on the former trial, but was mislaid or lost. The evidence accounting for its nonproduction was not very satisfactory as to the efforts made to find and produce it. The letter was as follows: "We have not received bill of last oats or barley. Would you please send the same." Conceding, without deciding, that the court erred in receiving this evidence, the defendants were not prejudiced, as there was no controversy in regard to the contents of the letter, and the writer, Mr. Middleton, testified in regard to it, and fully explained it.

9. Objection was made to the introduction in evidence of the entry of the barley transaction in the ledger of Ford & Co. One of the objections urged here is that "the ledger is secondary evidence." Mr. Morey testified that he was the bookkeeper of Ford & Co.; that the entry in the ledger was an original entry; that it was not entered in a pass-book or elsewhere, and then transferred to the ledger. It is also urged that the preliminary proof of the account-books kept by Ford & Co. was not sufficient. The entry in the ledger, being original, was competent for one purpose, if no other, viz., it tended to show with whom Ford & Co. understood they made the transaction, and to whom they looked for payment. The question here presented is clearly distinguishable from that decided upon the former appeal. There defendants' books were offered to show the absence of an entry relating to the barley, and as such absence might have been from negligence, or an intention to improperly or fraudulently omit it, it was not only proper, but necessary, to prove, preliminarily, the correctness of the books; and, having so proved them, they were improperly excluded. Here, this entry, though in the ledger, was original, and, as to the fact of its existence, was affirmative evidence, and, besides, there was other testimony, though not as to the correctness of their books, yet which tended more directly to establish the correctness of this particular entry than the technical proof of the correctness of the books, insisted upon by appellants. The court did not err in receiving the evidence objected to.

10. Appellants further contend that the court erred in permitting respondents' counsel, during his closing argument to the jury, "to read to the court, in the presence of the jury,"

from one of the California Reports. The fact that a cause is being tried before a jury does not take away the right of a party to instruct the court upon the law of the case by proper argument or the reading of authorities; and whether the jury shall be directed to retire during such reading is a question resting in the sound discretion of the trial court, and to be determined in view of the circumstances of the particular case. There is nothing in this record to indicate that the court did not properly exercise its discretion in ruling upon this objection of appellants.

11. Defendants' request to instruct the jury, marked "2," was properly refused. If plaintiffs were entitled to judgment against the defendants, it was upon the promise to pay \$750 for the Walker barley, and not for the value of the barley, which may have been more or less than that sum.

12. Appellants' request No. 3 was also properly refused. Whether or not there was an agreement or understanding between Cunningham and Walker that Cunningham would pay \$1,000 for the barley could not affect defendants' liability. The barley was mortgaged to Ford & Co. as security for a prior indebtedness, and was in their possession. Defendants agreed to pay a certain sum to plaintiffs if they would ship the barley to them. Whether plaintiffs knew of the agreement between Walker and Cunningham or what the defendants should do with or concerning the barley after it was delivered to them was immaterial. They were not in any manner affected by such prior agreement. The defense does not show that Ford & Co. had any notice of the arrangement between Cunningham and Walker at or before the time they took the mortgage, nor was there any element of ratification of the Cunningham-Walker arrangement in the transaction. They were content to receive \$750 and let the barley go, and were not concerned with anything else.

13. The remaining requests on the part of defendants, which were refused, are sufficiently covered by what has been said. Besides, the fourth instruction requested by defendants fully and clearly stated the law applicable to the case, so far as it was, or could be, under the evidence, affected by the prior arrangement between Cunningham and Walker, and this instruction was given. There was no error in the instructions given at the request of the plaintiffs.

14. The verdict and judgment were entitled, "Charles Ford, A. A. Morey, and J. S. Menasco, partners trading under the firm name of Charles Ford & Co.," as the plaintiffs; overlooking the change made by the death of Ford, and the substitution of his executors, which had been made by order of court. It is contended by appellants that the verdict and judgment are void for this reason. The mistake is capable of correction, and does not require a reversal of the judgment: Code Civ. Proc., sec. 475.

Finding no error in the record which would justify a reversal, I advise that the judgment and order appealed from be affirmed, with a direction to the court below to amend the title of the verdict and judgment so as to conform to the former order, substituting Ford's executors as parties.

We concur: Vanclief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, it is ordered that the verdict and judgment as entered in the court below be amended so as to conform to the former order, substituting Ford's executors as parties in place of Charles Ford, deceased, and that, as amended, the said judgment, and also the order appealed from, be affirmed.

REITER v. ROTHSCHILD.

No. 15,045; August 16, 1893.

33 Pac. 849.

Estate of Decedent—Money Paid to Testator as Security.—Plaintiff leased property of R., and gave him \$500 as security for the lease, he agreeing to pay it back on the expiration of the lease. R. died before the expiration of the lease, and H., who was appointed his executrix, filed an inventory, which recited: "Moneys belonging to said deceased which has come to the hands of the executrix \$500, held as security for lease from" plaintiff. H. died after the termination of the lease. Held, that it was not necessary to present a claim for the \$500 against the estate of R., but that an action might be maintained therefor against the estate of H.

Estate of Decedent—Money Paid to Testator as Security.—In view of the sworn statement of H., the finding of the court that she had in her possession the money deposited by plaintiff is supported by the evidence, though her executor testified that he made such statement, and that as a matter of fact it was not true, but was made because they felt she was morally liable for the money.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Catherine Reiter against Joseph Rothschild, executor of Hannah Rothschild, deceased, to recover money deposited by plaintiff with H. Rothschild, whose executrix was Hannah Rothschild. Judgment for plaintiff. Defendant appeals. Affirmed.

Jos. Rothschild for appellant; Wm. G. Cousins and Wm. B. Sharp for respondent.

TEMPLE, C.—Appeal from judgment and order denying new trial. From the findings and undisputed evidence it appears that on December 29, 1886, Henry Rothschild by indenture leased to the plaintiff the premises known as No. 835 on Sacramento street, San Francisco, for the term of three years and five months, beginning January 19, 1887, at a monthly rental of \$125. On the same day the parties to the lease executed another instrument in writing, wherein it is recited as follows:

“And whereas, as security for the prompt payment of the rent therein reserved and agreed to be paid by the said party of the second part to the party of the first part, at the times and on the conditions therein mentioned, and to and for the faithful compliance on her part with and performance of all the terms, covenants, promises, and agreements mentioned and set forth in the said lease, which said lease is here referred to and made a part of this agreement, the said party of the second part has paid to, deposited, and left with H. Rothschild the sum of five hundred dollars (\$500) in gold coin, to be kept, used and employed by him only for the uses and purposes herein stated: Now, this agreement witnesseth that if the said party of the second part shall [well] and truly pay all rents and perform and execute all the promises, covenants,

and conditions of the said lease, as therein contained on her part, then, and in that event, at the expiration and completion of the term of said lease, the said H. Rothschild hereby agrees to pay back the said sum of five hundred dollars (\$500) to the said party of the second part."

It was further stated that, in case the tenant did not perform her covenants, Rothschild was authorized to retain the \$500 as liquidated damages. On the same day Mrs. Reiter delivered the money to Rothschild, receiving the following receipt:

"Received, San Francisco, December 19, 1886, of and from Catherine Reiter, the sum of five hundred dollars, to be kept, used, and employed by me according to and upon the terms and conditions of the foregoing agreement, and in pursuance thereof.

"H. ROTHSCHILD.

"Witness: E. C. HISGEN."

Mrs. Reiter entered into possession under the lease, occupied the premises for the full term, and upon its termination, June 19, 1890, quietly surrendered the premises to the representatives of H. Rothschild. It is agreed that she paid her rent when due, and did in all respects perform all the agreements, promises, conditions, and covenants on her part in the lease. Before the expiration of the term, however, to wit, May 4, 1889, Henry Rothschild died testate, and on May 24th of the same year his widow, Hannah Rothschild, was appointed executrix of his will. The usual notice to creditors was published by her prior to June 24, 1889. June 10, 1889, Hannah Rothschild, as executrix of the will of Henry Rothschild, returned and filed an inventory of said estate, verified by her oath, as required by law, in which the following appears: "Moneys belonging to said deceased which have come to the hands of the executrix as follows: Cash, \$1,307.50; \$500, held as security for lease from Catherine Reiter, paid December 29, 1886, \$500.00." The verification states that the foregoing inventory contains a true statement of all the estate of said deceased which has come to her knowledge and possession, and particularly of all moneys belonging to said deceased. No claim of any kind was ever presented by plaintiff, or for her, against the estate of Henry Rothschild, deceased.

After the expiration of the term of the lease, to wit, October 26, 1889, Hannah Rothschild died intestate. November 18, 1889, Joseph Rothschild was appointed administrator with the will annexed of the estate of Henry Rothschild, and March 10, 1890, the administration of said estate was closed, and the administrator discharged. November 18, 1889, Joseph Rothschild was also appointed executor of the will of Hannah Rothschild, deceased, and duly qualified, and is still such executor. September 16, 1890, the plaintiff presented her claim against the estate of Hannah Rothschild in due form to the executor, by whom it was rejected September 29, 1890. This suit was brought to have judgment establishing her claim against that estate. Defendant denies that he received or has the money sued for. If Hannah Rothschild, therefore, received the \$500 deposited with Henry Rothschild by plaintiff, she must have converted it to her own use. As a witness the defendant says that he thinks plaintiff ought to have the money, but he says, as a lawyer and as executor, he thinks he should not pay it unless she establishes a legal claim to it. She ought to have presented the claim to the estate of Henry Rothschild, and, not having done so, he cannot pay it. This suggests the question raised on this appeal.

1. It is first suggested that it is averred in the complaint that the money was received by Hannah Rothschild as executrix, and it is claimed what she held as executrix must belong to the estate. The complaint also avers that Hannah Rothschild held the money for the use of the plaintiff. This is a very comprehensive allegation. It would be supported by any evidence which proves that she had money which, in equity and good conscience, she ought to pay to plaintiff. It was not necessary to aver that she received the money as executrix, yet in this case it was literally true, and the allegation does no harm. The leasehold estate had not terminated when Henry Rothschild died. Of course, there still remained something to be done by plaintiff, for the performance of which the money was held as security. In the absence of a showing we must presume that the premises and the lease still belonged to the estate, and Hannah Rothschild, executrix, would be entitled to retain the money until Mrs. Reiter had fully performed her covenants. When that was done, as it was, while Mrs. Rothschild was executrix, the estate had

no further interest in it, and Mrs. Rothschild was then a mere bailee of the money for Mrs. Reiter, and an action might have been maintained against her for it without demand: *Quimby v. Lyon*, 63 Cal. 394. If this be so, it is evident that it was not necessary to present the claim against the estate of Henry Rothschild, even if plaintiff might have elected to do so: See, on this subject, *Gunter v. Janes*, 9 Cal. 658; *Lathrop v. Bampton*, 31 Cal. 24, 89 Am. Dec. 141; *Roach v. Caraffa*, 85 Cal. 437, 25 Pac. 22; *Rowland v. Madden*, 72 Cal. 17, 12 Pac. 226, 870; *Von Schmidt v. Bourn*, 50 Cal. 616.

2. It is claimed by the appellant that there was no evidence to sustain the finding of the court that Hannah Rothschild had in her possession the money deposited by plaintiff. In view of the sworn statement of Hannah Rothschild, quoted above, it is difficult to comprehend this contention; but the point seems to be that defendant was himself the only one having personal knowledge of the matter, and he was a witness at the trial. He testified, among other things, that he had personally attended to the business for Henry and Hannah Rothschild, who were his parents. He drew the lease and the agreement, received the money from Mrs. Reiter for his father, and handed it to his father. He testified that Henry Rothschild put the money with his own, did not keep it separate, and that Mrs. Rothschild did not receive the \$500, or any portion of it, either as an individual or as executrix. He says: "She never included it in the inventory, and it never appeared there, because she never received it." He prepared the inventory himself, as the attorney of Mrs. Rothschild, and further testified in regard to the statement contained in it: "Question. And yet you let her sign that? Answer. Yes, sir; upon my advice that she should charge herself with the money, although she never got a dollar of it. I took the position that she was morally, if not legally, liable for this money, although she never got the money. It was upon the further theory that she was the sole devisee under the will, and I told her if she never received that money, although I knew she had not, she should pay it if she took it out of her own pocket, and so advised her." For an explanation this is certainly not a success. If true, it shows that Mrs. Rothschild did intend to make herself personally liable for the money. But the statement was made under oath, and

no reason can be imagined for swearing to such a statement, unless she had the money, and denied that, or at least doubted, whether it belonged to the estate. It is not necessary nor is it usual to state the debts in the inventory, and certainly the defendant, as an attorney, could not doubt that Mrs. Reiter had both a moral and a legal claim against the estate of Henry Rothschild for the money, and that it was unnecessary for her protection to state anything about it in the inventory. And then the statement, made from a conscientious desire to secure to plaintiff money justly due her, might result in her injury, if it can now be shown to be false; for, if the statement were true, plaintiff had no occasion to present her claim against the estate of Henry Rothschild. It is, after all, only a question as to whether there was a substantial conflict in the evidence. I think the finding in accordance with the evidence, and advise an affirmance of the judgment and order.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

HUNT v. SWYNEY (SHARP, Intervener).

No. 14,958; August 16, 1893.

33 Pac. 854.

Evidence.—S.'s Clerk, Y., Took an Assignment of Mortgage from him, foreclosed it, and took the property in his own name. S. having died, Y. contended, as against his widow, that he had bought the mortgage, and foreclosed it for himself. The widow asserted that she had bought it from her husband, and had it assigned to Y. for foreclosure. On direct examination, Mrs. S. was asked whether at the time in question Y. was her agent for collecting rents. Y.'s accounts were then put in evidence, showing large credits for rents collected for her, and charges for the notary's fee on the assignment of the mortgage, for taxes on the same, and expenses of foreclosure and sale. Held, that the question was proper as an introduction of the accounts.

Witness.—Where a Witness Responsively Answers a question in the affirmative, and then proceeds to state other irresponsible matters, a motion to strike out the whole answer is rightly denied.

Resulting Trust.—Y., Who had Been the Clerk of S., Deceased, and Mrs. S.'s rent collector, took an assignment of mortgage from S., foreclosed it, and took title to the land in his own name. Mrs. S. thereafter claimed the land as having bought the mortgage from her husband, and had it assigned to Y. to foreclose. Y. maintained that he had bought and foreclosed the mortgage for himself. The record of the foreclosure case showed that Y., cross-examined, had admitted his agency for Mrs. S. in the matter, and that the price of the mortgage was applied on a debt due from S. to his wife. Held, that the court was justified in finding him a trustee, who could have no possession adverse to Mrs. S.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by John Hunt, executor of the will of George F. Sharp, deceased, against Thomas N. Swyney, to establish a trust in favor of testator's estate in certain lots held by said Swyney. Honora Sharp, testator's widow, intervenes, claiming the trust for herself. Judgment for intervener. Defendant appeals.

Eugene N. Deuprey for appellant; Arthur Rodgers and Matt I. Sullivan for respondent.

HAYNES, C.—Appeal by defendant, Swyney, from a judgment in favor of the intervener, Honora Sharp, and from an order denying his motion for a new trial. An action was commenced October 17, 1887, by plaintiff, as the executor of the will of George F. Sharp, deceased, against the defendant Swyney et al., to compel said Swyney to convey to plaintiff a certain lot in the city of San Francisco, and to recover the value of the use thereof, alleging that said Swyney held the title in trust for the estate of his testator. Honora Sharp, the widow of said George F. Sharp, filed her complaint in intervention August 17, 1888, alleging the same facts, except that Swyney held the property in trust for her, and that she, and not the estate, was the owner, and entitled to a conveyance and to recover the rents and profits. On December 21, 1880, Alfred Rising and wife executed to George F. Sharp

their note for \$3,500 for money loaned, and a mortgage upon the lot in question to secure the same. On December 10, 1881, Sharp assigned the note and mortgage to defendant, Swyney, who foreclosed the mortgage, and upon a sale under the decree, in July, 1882, bid the amount of the judgment, and became the purchaser of the lot in controversy. Swyney assigned the certificate of purchase to one Pennie, to whom the sheriff executed a deed, but Pennie afterward conveyed the lot to defendant, Swyney. George F. Sharp died in October, 1882. For three years last before Sharp's death Swyney was his law clerk, and during the same time was the agent of Mrs. Sharp in collecting the rents of her separate property. Plaintiff claimed that the note and mortgage were assigned to Swyney in trust, for collection for the benefit of Mr. Sharp. Defendant Swyney claimed that he purchased and paid for the note and mortgage and foreclosed it for his own benefit, and the intervener, Mrs. Sharp, claimed that the consideration of the note and mortgage was her separate money, which her husband had invested for her, taking the note and mortgage in his own name; that the assignment to Swyney was without consideration and in trust, for foreclosure, collection and purchase for her exclusive benefit. Swyney's answer put in issue the material averments of the intervener's complaint, and pleaded the statute of limitations.

The findings fully sustain the contention of the intervener, but it is contended by appellant that in several material matters they are not justified by the evidence. So far as the findings are adverse to defendant's claim that he purchased the note and mortgage, and was the owner of them in his own right, and not in trust for the use and benefit of any person other than himself, the evidence, while conflicting, could lead to no other reasonable conclusion than that reached by the court. The particulars in which the testimony of the intervener is least satisfactory, and which are largely commented upon by appellant, are those which relate to the question whether the trust was for the benefit of herself or her husband; but the trust having been found on sufficient evidence, that is a question which does not materially concern the appellant, though the findings in that respect are sufficiently supported. Appellant also specifies several particulars in which he contends the court erred during the trial.

The judgment-roll in the case of Swyney v. Rising et al. was properly received. The copy of the note set out in the complaint omitted the words, "at the same rate," but the complaint was amended in that respect by leave of the court. Upon direct examination Mrs. Sharp was asked: "During the year 1881, from December 1st down to and including the month of October, 1882, was Mr. Swyney, the defendant in this action, your agent in collecting rents for you?" Objection was made that it was immaterial, irrelevant, and incompetent, and not pertinent to any of the issues. The objection was overruled, upon the ground that it was introductory. The specifications do not show that any motion was afterward made to strike out, while the record does show that defendant's accounts were put in evidence, showing not only that large amounts of rents were collected by the defendant for her, thus tending to show that she had moneys of her own, but also showing, among other things, that in his accounts to her of rents collected he charged her for the notary's fee for acknowledging the assignment of the Rising mortgage to himself, and for recording it, for paying the taxes on the mortgage, and for all the expenses of foreclosure of that mortgage, including a witness fee to himself and the expenses of sale. In view of this evidence the preliminary question leading to its introduction was entirely proper. The witness, in answer to a question, said, "Yes, sir"; and proceeded to state other matters not responsive to the question, the material parts of which appear in other portions of her testimony, and which so far as material, were harmless. The motion by appellant was to strike out the whole of the answer as not responsive. The motion was properly denied. A part was responsive, and therefore all the answer could not be stricken out.

Two other errors of law are stated in the specifications, being rulings upon the admission of testimony, and marked "D" and "E." I can see no valid objection that appellant could urge to either. Both questions were pertinent to the controversy between Mrs. Sharp and the estate, and, if erroneous upon any ground, it is not perceived how they could prejudice the appellant. These exceptions are stated in appellant's brief, but no comments of any character are made.

The remaining points relate to the findings, and have been disposed of, except that relating to the plea of the statute of limitations. Upon that issue the court found that the intervenor did not discover that Swyney claimed to own the premises until shortly before, and less than three years before, she filed her complaint in the cause, and that defendant actively and by artifice concealed from her the fact that he asserted a claim to the premises. Swyney was examined as a witness in the foreclosure case of Swyney v. Rising et al., and upon cross-examination was asked: "How much did you pay Mr. Sharp for that mortgage? Answer. Mr. Sharp was paid \$3,500. Q. How much did you pay? A. I paid that amount. Q. Who from, his wife? A. Yes, sir; I hold that for Mrs. Sharp. I am Mrs. Sharp's agent, and before the assignment of the mortgage was made Mr. Sharp was indebted to Mrs. Sharp for something like \$4,000. Mrs. Sharp instructed me that Mr. Sharp would assign to me a mortgage, and in consideration of that assignment I was to remit to him the amount of that indebtedness, \$3,500." It is clear from this evidence, given by Mr. Swyney at the time of the transaction, that he acted in the matter as the agent of Mrs. Sharp, who was the purchaser of the mortgage from Mr. Sharp, and that the foreclosure and purchase at sheriff's sale were for her benefit. It is not alleged that he ever purchased the property from her, nor paid to her the consideration she paid her husband for the mortgage. Sustaining, as he then admitted, the confidential relation of agent, Mrs. Sharp being the equitable owner of the mortgage and of the property paid for by the judgment, he could not acquire title to the property thus held by him in trust by adverse possession, without a clear and unequivocal repudiation of that trust, and an assertion of his own claim of title brought to her knowledge. The finding of the court upon the plea of adverse possession is justified by the evidence. The judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Vancief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

PEOPLE v. GALLAGHER.*

No. 20,972; August 16, 1893.

33 Pac. 890.

Embezzlement—Drawing Funds from Bank.—The President of a Corporation, to pay an indebtedness of the corporation, the exact amount of which he did not know, signed, as president, a blank check, payable to the secretary, which was given to him, with directions to fill in the amount, and pay the debt. He filled it in for a larger amount, and on having it paid to him appropriated the entire sum. Held, that the money paid him was the money of the corporation, and not that of the bank.

Embezzlement—Drawing Funds from Bank.—It Being Within the Course of the secretary's employment to draw, on like checks, the money of the corporation from the bank, and to pay its debts, he is estopped to claim that the money did not come into his control by virtue of his employment, because he filled in the check for a larger amount than he was authorized.

Embezzlement — Aiding and Abetting.—By Previous Appointment defendant went to a saloon near a bank, while the secretary drew the funds. They immediately went to another city, where defendant registered under a fictitious name, procured currency for part of the coin, took most of the funds, in a valise, to a railroad station, where he obtained two tickets, paying therefor from the appropriated funds. Defendant carried the funds part of the way, and when arrested had some of them on his person. Held, that the evidence warranted a conviction of defendant for aiding and abetting in the embezzlement.

Criminal Trial—Cross-examination of Defendant.—Penal Code, section 688, provides that in a criminal action one cannot be compelled to testify against himself, and section 1323 provides that, if a defendant in a criminal action offer himself as a witness, he may be cross-examined as to matters about which he was examined in chief. Held that, where defendant had merely denied that he had advised another to draw money from a bank for the purpose of embezzling it, and had denied all knowledge of intention of the other so to do, it was error on cross-examination to allow him to be asked questions relating to facts transpiring after the money was drawn.

APPEAL from Superior Court, Alameda County; W. E. Greene, Judge.

*For subsequent opinion in bank, see 100 Cal. 466, 35 Pac. 80.

B. F. Gallagher was convicted of embezzlement, and appeals. Reversed.

W. F. Aram for appellant; Attorney General Hart and Geo. W. Reed, district attorney, for the people.

SEARLS, C.—Defendant was convicted of the crime of embezzlement, and appeals from the judgment and from an order denying a motion for a new trial.

The indictment charges that at the county of Alameda one Richard C. Beggs, a clerk, agent and servant of the "Oakland Consolidated Street Railway Company" (a corporation), embezzled \$8,500, the personal property of said company, and that the defendant, B. F. Gallagher, did aid and abet said Beggs in such embezzlement.

The first point made by appellant is that Beggs did not commit the crime of embezzlement, as charged in the information. "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted": Pen. Code, sec. 503. Section 508 of the Penal Code is in the following language: "Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement." The crime of embezzlement is a statutory offense, and was unknown to the common law. It is said that in the common-law definition of larceny there were two gaps through which, in the expansion of business, many criminals escaped. The first of these gaps was caused by the rule that to sustain a charge of larceny it was necessary that the stolen goods should have been at some time in the prosecutor's possession. The second was in the assumption that when possession of goods was acquired by a bailee no subsequent fraudulent conversion constituted larceny while the bailment lasted, save in a few excepted cases. It was to meet these defects in the common law that statutes have been passed in most, if not all, of the states of our Union, in some of which an offense is created known as embezzlement larceny, and in others, as in our own statute, designating the offense as embezzlement. The case at bar relates to the remedy for the

first defect mentioned in the common law, viz., a case in which the personal property alleged to have been fraudulently converted had not been in the prosecutor's possession.

These preliminary remarks with a view to the better understanding of the initial points in the case, and we proceed to a review of the contention of appellant, the underlying theory of which is that the money alleged to have been embezzled did not come into the control or care of Beggs by virtue of his employment as a clerk, agent, or servant. The uncontradicted evidence was to the effect that the Oakland Consolidated Street Railway Company (a corporation) was doing business at Oakland, in the county of Alameda, was indebted to two companies in several sums of money aggregating say \$2,500; that Richard C. Beggs was secretary of the corporation, and as such secretary his duties were, among other things, to keep the books of the company, to receive all the coin due the company, and deposit it (except small sums, kept to pay off discharged workmen) in the First National Bank of the city of Oakland; to draw and sign checks as secretary, which checks were also to be signed by the president or vice-president; that the corporation had in the bank aforesaid some \$8,000 to \$10,000 and credit for an overdraft of \$10,000; that on or about June 3, 1892, J. E. McElrath, vice-president of the corporation, for the purpose of paying off the indebtedness of the corporation to the two companies aforesaid, and not knowing the precise amount thereof, signed and delivered to Beggs two checks, payable to his (Beggs') order, on said bank, leaving the amount to be paid thereon and on each of them in blank. The evidence is contradictory as to whether Beggs was to indorse the checks and deliver them to the creditors or to draw the money thereon from the bank and pay them. As there was evidence to that effect, we must, in favor of the verdict, assume the latter theory to have met the approbation of the jury. On the sixth day of July, 1892, Beggs filled up the checks, one for \$4,000 and the other for \$4,519.20, signed them as secretary, drew the full amount thereof, aggregating \$8,519.20, from the First National Bank, converted \$1,300 thereof into currency, left \$2,500 with his wife, and fled with the residue to the northern part of the state, where he was arrested two or three days later, and thereupon confessed his guilt. The connection of defendant with the transaction is

not here mentioned for the reason that the contention under this head relates only to the receipt of the money by Beggs in the course of his employment. The argument that the money received by Beggs was that of the bank, and not that of his corporate employers, cannot be maintained. The corporation had funds in the bank. The checks were duly signed by the authorized officer of the corporation, and countersigned by Beggs, its secretary. Under such circumstances, it was not only the privilege, but the duty, of the bank to pay the checks to Beggs, who was the payee and holder thereof, upon presentation; and when paid the amount of payment was a proper charge against the corporation. This being so, the money, when received by Beggs, was as much the property of the corporation as though collected by the former for it upon a lawful account against any other debtor of the corporation.

It is further urged that Beggs had no authority to draw the money from the bank, and hence it did not "come into his control or care by virtue of his employment," within the purview of the statute. The earlier English authorities are not uniform on this proposition. In *Rex v. Snowley*, 4 Car. & P. 390, the prisoner was hired to perform certain services, and was authorized to receive not less than twenty shillings in each case. In a single instance he charged only six shillings, which he received, and did not account for. Held, that there was no embezzlement of the six shillings, inasmuch as it was his duty to take no sum less than twenty shillings, and therefore the six shillings were not received by the prisoner in the course of his employment. There are other English cases of like import, while perhaps an equal number of cases in the same courts hold a contrary doctrine. Bishop, in his work on Criminal Law, in commenting upon *Rex v. Snowley*, uses the following language: "That in reason, whenever a man claims to be a servant while getting into his possession by force of this claim the property to be embezzled he should be held to be such on his trial for the embezzlement. Why should not the rule of estoppel, known throughout the entire civil department of our jurisdiction, apply in the criminal? If it is applied here, then it settles the question; for by it, when a man has received a thing from another under a claim of agency, he cannot turn round and tell the principal asking for the thing, 'Sir, I was not your agent in taking it, but a deceiver

and a scoundrel' ”: Bish. Crim. Law., 3d ed., sec. 367. In the seventh edition of the same work, like language, with some additions, is used at section 364 of volume 2. In *Ex parte Hedley*, 31 Cal. 109—a case involving the same question, and in many respects similar to the one at bar—this court quoted with marked approval the foregoing extract from Bishop, and in an opinion regarded as conclusive of the question here held that, if an agent obtains the money of his principal in the capacity of agent, but in a manner not authorized, and converts the same to his own use, with intent, etc., it is money received “in the course of his employment” as agent. The evidence shows that it was within the course of the employment of Beggs to draw, upon like checks with those in question, the money of the corporation from the bank, and to pay its debts. In the present instance he held the two checks with authority to fill them up in amounts aggregating about \$2,500, and, according to his evidence, to draw the money, and pay the creditors of the corporation, or, according to the evidence of the vice-president, to indorse and deliver them to the creditors. It was as the secretary, and in the course of his employment as such, that he received the checks and filled them up, but in a manner different from his instructions, in that he filled them for larger amounts than he was authorized. Under such circumstances, he comes within the rule laid down by Bishop, *supra*, as interpreted in *Ex parte Hedley*, *supra*.

Appellant further insists that there is no evidence whatever that defendant aided and abetted in the appropriation and conversion of the money. In the light of the testimony this claim seems somewhat extraordinary. There was testimony tending to show that by previous appointment defendant repaired to a saloon in the vicinity of the bank while Beggs procured the money; that they immediately met, and came to San Francisco with the funds, procured a private room at the Lick House, where defendant registered under a fictitious name; that he procured currency for \$1,300 of the coin, took all of the funds except \$2,500, in a valise, to the Oakland station, procured tickets for himself and Beggs to Sacramento, paying therefor from the appropriated funds, had access to and carried the money at least a portion of the time, and when arrested had \$50 or \$60 of the money on his person, coupled with the fact that they did not pursue the usual course of

travelers in procuring through tickets to their destination, but only for short distances, and in various ways acted unlike men with money in hand, honestly acquired, intent upon a journey, taken in connection with the statements of defendant when arrested and subsequently, lead irresistibly to the conclusion that the two men were particeps criminis. Waiving, therefore, the evidence that it was the defendant who, previous to the commission of the crime, had "advised and encouraged" it, and we think the evidence against defendant was ample to warrant a conviction. The very fact that the embezzlement was determined upon before the money was drawn from the bank detracts nothing from the guilt of defendant as an aider and abetter under such circumstances. Mere intention to commit a crime does not constitute an offense. Had Beggs, after procuring the money from the bank, honestly appropriated it to the legitimate uses of his employer, then, although the amount was in excess of the sum he was authorized to draw, his offense would have been incomplete. It was the subsequent wrongful appropriation of the funds that constituted the crime, and in this the defendant participated under circumstances clearly indicating guilty knowledge and criminal intent. He was not simply an accessory after the fact, but a coworker in the performance of the acts constituting the corpus delicti.

Defendant, Gallagher, was a witness in his own behalf at the trial, and upon cross-examination certain questions were propounded by the court, against the objection of defendant's counsel, and this action is assigned as error. Beggs was a witness for the prosecution, and had testified at length in the case, and as to all, or nearly all, of the facts therein. Among other things, he related that after he received the two checks defendant saw them, and advised filling them up, drawing the money, and fleeing to Seattle, or some foreign port; that they met on Saturday, June 4th, again on Sunday, and talked the matter over, and finally agreed that on Monday, June 6th, at 12 o'clock, the witness was to draw the money, and defendant to wait outside until Beggs came out, and, if detained long, defendant was to go to a certain saloon across the street, and wait for him; that he drew the money, and met the defendant at the saloon. Beggs further detailed their acts from thence until arrested. As a witness in his own behalf, defendant

denied that on Saturday next before June 6th he saw the checks, or that he ever saw them prior to the trial; denied that he ever advised Beggs to take the funds of the bank or of the corporation, or to draw the funds, or that he suggested that they would or could go to Canada or elsewhere and divide the money. He admitted they met on Sunday (June 5th), and that Beggs made an appointment to meet him at the saloon the next day, but declared there was no particular purpose for which they were to meet, and averred that nothing was said about drawing money from the bank. Defendant was then asked if he and Beggs did go to San Francisco and take the \$8,500, etc.? (2) If he, in San Francisco, assisted Beggs in changing the money to the extent of \$1,300 into currency? (3) If he took \$6,000 of the money back to Sixteenth street, Oakland? These questions were each of them objected to upon the ground of not being proper cross-examination, not having reference to any matter testified to by the witness in his examination in chief, etc. Upon the objections being overruled, and exceptions duly taken, the witness declined to answer, upon the ground that such answer would tend to criminate him, whereupon the court compelled the witness to answer. He answered that he did go with Beggs and take the money to San Francisco; that he did exchange \$1,300 of the coin into currency; and did take \$6,000 of the money to Oakland, etc. "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief": Pen. Code, sec. 1323. "No person can be compelled, in a criminal action, to be a witness against himself": Pen. Code, sec. 688. In *People v. O'Brien*, 66 Cal. 602, 6 Pac. 695, it was held that where the accused offers himself as a witness, and testifies to particular facts only, he cannot be cross-examined generally as a witness in the case. "He may be cross-examined . . . as to all matters about which he was examined in chief." By this expression it is understood that the cross-examination must be confined strictly, not to the precise questions put to the witness in chief, but to the subject matter concerning which he has testified. In other words, it must be a legitimate cross-examination, within the rules of evidence, and with no discretion on the

part of the court to enlarge the field of inquiry—an examination the trend of which must be in the direction of disproving, explaining or enlarging the proofs upon the very subject concerning which he has spoken in his direct examination. Within this field he may be tested in like manner with other witnesses. But when, under the guise of discrediting the witness, he is questioned and compelled to testify upon branches of the case to which his direct testimony did not extend, and thus to become a witness against himself, the testimony is without the pale of cross-examination, and his constitutional and statutory rights are as clearly violated as though he had never consented to become a witness. Tested by this rule, it would seem the court below erred in compelling defendant to answer the questions to which objection was made. He had testified to the extent of denying that on or before June 6th he had advised Beggs to draw the money from the bank for the purpose of embezzling it, and denied all knowledge of the latter's intention so to do. The cross-examination extended to facts transpiring after the money was obtained, including its disposition, the flight of the parties, and other damaging facts; all of which was highly injurious to defendant. The following cases bear more or less directly upon the subject in hand: *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396; *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36; *People v. Cline*, 83 Cal. 374, 23 Pac. 391. See, also, *Rice, Ev.*, note to page 344, where the whole subject is discussed, and cases cited. I find no other error in the proceedings worthy of note. For the error in admitting the evidence of defendant on cross-examination the judgment and order appealed from should be reversed and a new trial ordered.

We concur: Belcher, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

PEOPLE v. WORTH et al.

No. 15,005; August 16, 1893.

33 Pac. 913.

Bail Bond.—The Fact That Judgment on a Bail Bond is rendered against the principal, who was not summoned and who did not appear, does not render it invalid as to the sureties, against whom judgment was also rendered, in accordance with the terms of the bond making each surety liable for the full amount thereof.

APPEAL from Superior Court, Sonoma County; A. K. Dougherty, Judge.

Action by the people of the state of California against Charles H. Worth, as principal, and others, as sureties, on a bail bond. Judgment for plaintiff and the sureties appeal. Affirmed.

James W. Oates for appellants; A. G. Burnett for respondent.

GAROUTTE, J.—The defendant, Worth, being under arrest, charged with the commission of a criminal offense, was released from custody upon filing an undertaking on appeal, wherein he was principal, and the present appellants sureties. Upon his failure to appear, the bail bond was declared forfeited, and this action was brought to recover thereon. Judgment went for the people, and this appeal is prosecuted by the sureties on the bail bond from the judgment and order denying a new trial. There appears to have been neither a service of summons upon the defendant Charles H. Worth, nor any appearance by him, although the judgment is rendered against him, as well as the sureties upon the bail bond; and upon this ground the judgment is attacked by the appellants. The liability of each surety upon the bond was for the full amount thereof, and the judgment is to the same effect. We are unable to see in what manner appellants are injured by the judgment of which they complain. The fact that other parties are made liable by its terms should be a source of satisfaction to them rather than of complaint, as it furnishes additional

aid in bearing its burdens. Conceding the facts as contended, the wrong done by the trial court was committed against Charles H. Worth, and he has taken no appeal. The judgment is a valid judgment as to appellants in all respects, and its invalidity as to others not complaining is a matter with which they have no concern. We see no valid objection to the form of the order declaring the bail bond forfeited. For the foregoing reasons, let the judgment and order be affirmed.

We concur: Beatty, C. J.; Harrison, J.

PETERSEN v. SHAIN et al.

(MOOSER v. PETERSEN et al.)

No. 14,613; August 16, 1893.

33 Pac. 1086.

Mechanics' Liens.—In Consolidated Actions to Establish mechanics' liens by P., a subcontractor, against the contractor and owner, and by M., a materialman, against P. and such contractor and owner, the complaints both alleged that P. was the subcontractor and performed the work, and that M. furnished the materials to P. These allegations were not denied. The court found that P. & Co., a copartnership, made and performed the subcontract; that M. furnished the materials; and that the contractor paid P. & Co., who in turn paid M. Held, that a judgment for defendants in the consolidated case was not erroneous, on the ground that such findings were contrary to the admissions of the pleadings, since the acceptance of payment by such firm implies P.'s consent, and must be considered as payment to him.

Mechanics' Liens—Payment.—It Appeared That the Contractor delivered to M. certain checks, payable to the order of P. & Co., to enable him to get his pay, and that they indorsed the checks to him, but the latter applied the money to payment of other indebtedness due him from such firm. Held, that a finding that M. was paid was proper, and not inconsistent with other findings.

APPEAL from Superior Court, City and County of San Francisco; Eugene R. Garber, Judge.

Two actions, consolidated: One by H. M. Petersen against E. R. Shain and one Drexler, to recover a personal judgment

against Shain, as contractor, and to enforce a mechanic's lien for labor done and materials furnished by plaintiff as subcontractor in the construction of a building for Drexler; and the other by C. E. Mooser against H. M. Petersen, E. R. Shain and Drexler, to recover of defendant Petersen a sum claimed to be due for materials furnished, and to enforce a mechanic's lien against such building. From judgments in favor of defendants Shain and Drexler in the consolidated action, plaintiffs appeal. Affirmed.

William Rix for appellants; Vincent Neall for respondents.

VANCLIEF, C.—Action to recover money judgments, and to enforce mechanics' liens for labor done and materials furnished in constructing a brick building known as the "Drexler Building." The two actions were consolidated and tried together. Drexler was the owner of the building, Shain the original contractor, Petersen a subcontractor directly under Shain, and Mooser a subcontractor under Petersen. In the first action, Petersen seeks to recover a personal judgment against Shain for a balance of \$561.70, alleged to be due the former on his subcontract with the latter, and also to enforce a lien therefor upon the building against the owner. In the second action, Mooser seeks to recover from Petersen the sum of \$959.75, alleged to be due him on his subcontract with the latter, for materials furnished, and to enforce a lien therefor upon the same building. The defendants in the first action, Shain and Drexler, denied any indebtedness of the defendant Shain to the plaintiff, Petersen, and alleged full payment by Shain of all sums due Petersen on his subcontract, before Petersen filed his claim of lien. The court found the denial of Shain's indebtedness to Petersen, and the averment that such indebtedness had been fully paid, to be true, and gave judgment for defendants. In the second action (Mooser v. Petersen, Shain and Drexler), Petersen did not answer, but it does not appear that his default was entered. Shain and Drexler answered, denying all alleged indebtedness, and averring payment in full for all materials alleged to have been furnished by plaintiff to Petersen to be used in the construction of said building. The court also found this answer to be true, and adjudged that the plaintiff, Mooser, "take nothing by this action as against the defendants Shain and Drex-

ler''; that plaintiff's claim of lien is void, and is set aside; and that said defendants recover their costs. Both plaintiffs, by a joint notice, appeal from the judgments in the consolidated action, "in favor of said defendants Shain and Drexler." But Mooser, the plaintiff in the second action, has not appealed from the judgment therein, so far as it is in favor of the defendant Petersen, to whom he furnished the materials, and against whom he prayed for a personal judgment; and no point is made here upon the failure of the court to render a personal judgment against Petersen upon his default. The appeals are upon the naked judgment-roll in the consolidated action, without any bill of exceptions. In both cases Drexler is sued as administrator of George H. Dana, as well as personally, but his character as administrator is immaterial for any purpose of this appeal.

Appellants' counsel contends that the findings are contrary to admissions of the pleadings, and, consequently, that the judgment is erroneous. It is true that it is alleged in both complaints that Petersen was the subcontractor under Shain, and performed the work, and that Mooser furnished the materials to Petersen at his request; and these allegations are not denied. The court found, however, that Petersen & Co. (a copartnership, composed of Petersen and his son) made and performed the subcontract, and that Mooser furnished the materials to Petersen & Co. The judgment, however, does not depend upon these findings, but rests solely upon the finding of payment to Petersen and Mooser. The court found that the total value of the labor and materials done and furnished under the subcontract, including the materials furnished by Mooser, was only \$2,658.75. That Shain drew his checks on the Pacific Bank in favor of Petersen & Co. as follows: March 19, 1889, \$400; March 23, \$200; March 29, \$500; April 20, \$630; April 27, \$60; June 8, \$500; June 14, \$500. That the last two checks, each for \$500, were delivered by Shain to Mooser to enable him to obtain payment from Petersen & Co. for the materials furnished by him, and were indorsed to him by Petersen & Co., who credited the same to Shain on the subcontract, and that they were paid to Mooser by the bank. That the other five checks were paid to Petersen & Co., who credited them also to Shain on the subcontract. It is thus found that Shain paid to Petersen & Co. \$2,790, with which sum he was credited on account of Petersen's subcontract,

which called for only \$2,754.55. I think the payments, thus accepted and credited by Petersen & Co. as payments on Petersen's subcontract, should be considered as payments to Petersen on that contract, since such acceptance and credit implies Petersen's consent. Indeed, he expressly admits in his complaint that he had been paid \$2,192.85, which necessarily included payment for a large portion of the materials furnished by Mooser. Can it be presumed that this payment of \$2,192.85 was, in addition to the payment of \$2,790 to Petersen & Co., by checks on the bank? If so, Shain had paid to Petersen and Petersen & Co. \$4,982.85 on a contract which, according to the complaint, bound him to pay only \$2,754.55, and, according to the finding of the court, only \$2,658.75. The finding that nothing was due or owing from Shain to Petersen is at least a necessary inference from the other facts found and admitted. What was accepted and credited as payment by Petersen & Co. was necessarily so accepted and credited by Petersen.

The only point made on Mooser's appeal is founded on the eleventh finding, to the effect that, when Mooser drew the money on the two checks drawn by Shain and indorsed by Petersen & Co., he applied the money (\$1,000) to the payment of a prior debt due him from Petersen, according to an agreement between him and Petersen made on May 1, 1889, thirty-nine days before the first of said checks was drawn and forty-six days prior to the date of the second check. As before stated, those checks were delivered to Mooser by Shain to enable him to obtain payment from Petersen & Co. for the materials furnished by him for the Drexler building. Shain, as the original contractor, was bound to clear the building of all liens for labor and materials done and furnished by his subcontractor, Petersen, and therefore was interested in having Petersen's subcontractor, Mooser, paid for all materials furnished by him. Under these circumstances, Shain, with the consent of Petersen, had a right to pay Mooser for the materials furnished by him, and to direct the application of the payment to that purpose; and the court found that Mooser was fully paid by the two checks. This ultimate fact, upon which the judgment in favor of the owner and original contractor rests, is not inconsistent with any other finding. Even the probative facts found tend to prove it. But the suf-

ficiency of the evidence to prove it cannot be questioned on this appeal upon the judgment-roll alone.

Counsel for appellants lays some stress upon the finding that, at the time the claims of liens were filed, there remained unpaid to Shain, the original contractor, \$4,188 of the original contract price, and therefore the owner would suffer no injury by being compelled to satisfy the alleged liens of the plaintiffs. This, however, would be small comfort to Shain, the original contractor, who paid Mooser for the purpose of preventing his claim of lien, and thereby enabling himself to obtain from the owner full payment of the original contract price. The case of *Schallert-Ganahl Lumber Co. v. Neal*, 91 Cal. 362, 27 Pac. 743, is not in point for appellants. I think the judgment in each of these causes should be affirmed.

We concur: Temple, C.; Haynes, C.

PER CURIAM.—For the reasons expressed in the foregoing opinion the judgment in each of these causes is affirmed.

SAULQUE v. DURRALDE.

No. 19,121; August 16, 1893.

33 Pac. 1090.

Forcible Detainer—Plaintiff's Possession—Sufficiency.—In forcible detainer, it appeared that plaintiff claimed under a lease of the stubble; that he kept sheep three days on twenty acres not in grain; that fifteen days afterward he put three watering troughs on the land; that fifty-three days thereafter he returned and demanded possession of defendant, who had taken possession; and that at such time the grain was cut, but on the ground unthreshed. Held, that plaintiff did not have such possession as entitled him to recover, under Code of Civil Procedure, section 1160, subdivision 2, which provides that a person is guilty of forcible detainer who, during the absence of the "occupant" of any lands, unlawfully enters thereon, and that "occupant" means one who, within five days preceding such unlawful entry, was in peaceable possession.¹

¹ Cited in the note in 121 Am. St. Rep. 384, on the right to a civil action for forcible entry and detainer.

APPEAL from Superior Court, Ventura County; B. T. Williams, Judge.

Action by Jules Saulque against Buente Durralde for forcible detainer of a certain tract of land. From a judgment of nonsuit and from an order denying his motion for a new trial plaintiff appeals. Affirmed.

Barnes & Selby for appellant; Blackstock & Shepherd for respondent.

HAYNES, C.—The plaintiff appeals from a judgment of nonsuit entered against him, and from an order denying his motion for a new trial. The action is for forcible detainer of a tract of land containing about four hundred acres. The complaint was framed under the second subdivision of section 1160, Code of Civil Procedure, alleging that at the time of defendant's entry, and for five days prior thereto, the plaintiff was in peaceable and actual possession and occupation, and entitled to the possession, of the whole ranch; that on August 25, 1891, during his temporary absence, defendant unlawfully entered and took possession; and further alleged a demand for possession, and defendant's refusal for five days; that he was damaged, etc. The answer denied these allegations, and pleaded a right to enter and depasture the stubble under a license from the owner of the ranch. One T. W. Dixon occupied and farmed the ranch in question on the shares. On June 19, 1891, he made an agreement with the plaintiff, of which the material part is as follows: "I have rented to Jules Saulque the stubble on the place known as the 'Sturgiss Place' which is farmed by me, comprising about four hundred acres, at the rate of \$320 for the whole place. I reserve the right to use one well for my exclusive use." Plaintiff testified that on July 15th he went upon a part of the land with a flock of sheep, and kept them there three days, and then took them away; that on August 3d he went back without the sheep, and put some watering troughs upon the land; that on August 26th he again returned, and found that someone had removed his troughs and put them out on the county road, and also found the defendant on the land with his sheep, and made a demand that he surrender possession. At the last-named date the grain had been cut, but was still lying in

"dumps," and had not been threshed. The part of the land upon which plaintiff had his sheep for three days in July was not in grain, and embraced about twenty acres, upon which, plaintiff said, Mr. Dixon gave him permission to put his sheep. The defendant took his sheep upon the same part of the land the day preceding plaintiff's demand. Mr. Dixon testified that he was living upon the farm, farming it on shares; that one-half of whatever he got was his; that he gave defendant, who had his sheep upon other land, the right to water them at the well near the house, but that he gave him no other right.

I think the plaintiff did not show such possession as would have supported a verdict in his favor, and that the nonsuit was properly granted. The grain not having been removed, the right to enter given by the lease or contract had not accrued, and there was no possession or present right of possession under it. The occupancy of the twenty acres not in grain, for three days in July, and placing three watering troughs upon it on the 3d of August, was not such an occupancy on the 25th of August as the statute contemplates as a basis for so harsh a remedy as that of "forcible detainer."

Some exceptions were taken to the rulings of the court upon questions of evidence. The only exception noticed in appellant's brief relates to the question of damages. As the plaintiff did not show a right to recover in the action, he was not injured by the exclusion of evidence upon that question. An examination of the whole record discloses no prejudicial error. The judgment and order appealed from should be affirmed.

We concur: Searls, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion it is ordered that the judgment and order appealed from be affirmed.

WETZEL v. WEBB.

No. 18,115; August 16, 1893.

33 Pac. 1105.

Mortgaged Chattels—Conversion—Action by Mortgagee.—In an action by a chattel mortgagee of growing crops, for conversion thereof, the defense being a justification as purchaser thereof, a finding that at the time of giving the mortgage the mortgagor was the owner and in possession of the crop authorized a judgment for plaintiff.

APPEAL from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Alois Wetzel against C. C. Webb for conversion of grain. Judgment for plaintiff. Defendant appeals. Affirmed.

Warren & Taylor and T. M. Osmont for appellant; James Farraher for respondent.

GAROUTTE, J.—Respondent held a chattel mortgage upon a growing crop of grain situate upon the land of one Jones. At a time when said grain was in the stack upon the land, preparatory to threshing, appellant Webb took possession of the same, and, on threshing it, converted it to his own use. This action was brought in the nature of conversion, to recover damages in the amount of respondent's lien. Judgment was so awarded and an appeal from that judgment is now before us.

The demurrer was properly overruled. All the facts constituting the cause of action were set out in the complaint, and that is the proper procedure, as declared by the code. Appellant justified his acts by setting up title to the growing crop under an oral agreement that it should be his, to be applied to the payment of certain interest due from said Jones to him on the purchase price of the land upon which the crop was grown. The question of the title to the grain is the only matter involved in the litigation, and its determination necessarily points the judgment. Among the matters of fact found

by the court is the following: "That at the time of the execution of said note and mortgage to plaintiff by the said James T. Jones, and thereafter, and at the time the advances were so made, as alleged in the complaint, by defendant, and under the terms of said mortgage, the said James T. Jones was the owner of, and in possession of, all said grain crop." This finding has ample support in the evidence, and demands that judgment should go in favor of respondent. It is insisted that certain other findings of fact made by the court are not supported by the evidence. Conceding such contention to be true, the validity of the judgment is not affected, for those findings passed upon collateral matters. Especially is this so in view of the finding that the grain was the property of the mortgagor at the time the mortgage was executed. For the foregoing reasons, let the judgment and order be affirmed.

We concur: Harrison, J.; Beatty, C. J.

GRANGERS' BANK OF CALIFORNIA *v.* SUPERIOR
COURT OF CITY AND COUNTY OF SAN FRANCISCO.

No. 15,323; August 19, 1893.

33 Pac. 1095.

Writ of Prohibition—Actions to Recover Realty.—Under the constitutional provision that actions for the recovery of real estate shall be commenced in the county in which it is situated, a writ of prohibition will issue to a court entertaining such an action, for real estate outside the county, though an accounting is also asked as to the rents and profits, and though various proceedings had been had in the action, without any question as to the jurisdiction of the court.¹

Application of the Grangers' Bank of California for writ of prohibition to the Superior Court of the City and County of San Francisco, Department 6; William T. Wallace, Judge. Writ granted.

¹ Cited in the note in 111 Am. St. Rep. 944, on the writ of prohibition.

Pillsbury, Blanding & Hayne for petitioner; George W. Towle, Jr., and H. S. Foote for respondent.

GAROUTTE, J.—This is an application for a writ of prohibition, and the following state of facts is disclosed by the petition: The Grangers' Bank of California was the owner of certain warehouses, situated in the counties of Fresno, Tulare, etc., some of these warehouses being erected upon the lands of the bank, and others on the lands of the railroad company, leased to the bank by that corporation. Upon the sixth day of January, 1890, the bank entered into a contract of sale with one W. G. Ross, wherein it was agreed, among other things, that said Ross should pay the bank \$49,000, at the times and in the manner therein provided, and in consideration thereof the bank agreed to sell and transfer to said Ross these warehouses, together with all scales, platforms, etc., belonging to said warehouse business. It was provided that the title to the warehouses should not vest in Ross until the money was paid as covenanted. It was further understood that the interests of the bank in and to the ground upon which the warehouses were situated should pass to Ross upon the consummation of the sale. The right of re-entry by the bank upon default upon the part of Ross was also a condition of the contract. Under this agreement Ross entered into the possession of the warehouses, and in the fall of the year 1890, being largely indebted to the bank, made an assignment of all the property referred to in the contract to one Showers, for the purpose of securing his liability to the bank, and Showers thereupon took possession thereof. About January 1, 1891, the bank, claiming that Ross had forfeited his rights under the contract by reason of certain defaults on his part, took possession of the property, claiming to be the true owner, and ever since has had such possession. Thereafter Ross commenced an action in the superior court of the city and county of San Francisco against Showers and the bank, alleging, among other matters, that his indebtedness to the bank is more than offset by the receipts from the rents, issues, and profits of the business; that the contract has not been forfeited, and he has demanded the possession of the warehouses, which has been refused; that the use and occupation are of great value, and he prays for an accounting as to the rents,

issues, and profits; that the bank deliver to plaintiff the warehouses, platforms, etc., referred to in the contract; that the bank be declared to be paid in full from such rents and profits; that he be declared to be the owner thereof; and that said contract be held to be in full force and effect. Issue was joined upon the complaint, and during the pendency of the action an application to the trial court for the appointment of a receiver was made, and the defendant bank brought this proceeding to restrain the court from making such appointment, upon the ground that such act would be in excess of jurisdiction. In addition to the foregoing matters, the petitioner alleged that the present status of the case of *Ross v. Showers et al.* is such that the only substantial issues involved relate to the right of possession, recovery of possession of its warehouses, and the rents, issues and profits thereof. The petitioner further alleged that said warehouses were real estate. The return to the alternative writ is made by *Ross*, the real party in interest, and consists principally of the affidavit presented by him to the lower court upon his application for the appointment of a receiver. No denial is found anywhere in such return as to the allegations of the petition pertaining to the nature of the issues at present involved in the litigation of *Ross v. Showers et al.*, and neither is there a denial of the allegation of the petition that said warehouses were real estate. Petitioner insists that the writ should issue, in this: That the appointment of a receiver would be an act in excess of the jurisdiction of the trial court, and that said excess of jurisdiction consists in: (1) that a receiver in the case is not authorized by section 564 of the Code of Civil Procedure; (2) that the property involved in the litigation is realty situated in Fresno and Tulare counties, and it follows therefrom that the superior court of the city and county of San Francisco has no jurisdiction of the subject matter of the action.

We have not stated all the facts disclosed by the record bearing upon petitioner's first ground of contention, as we shall not discuss it, being satisfied that the second ground relied upon has sufficient merit to entitle it to the relief demanded. It is to be regretted that counsel opposing the application has not seen fit to attempt to enlighten the court, either in his oral argument or brief, upon the merit of appel-

lant's contention in this regard. His only answer thereto is set out in his return, and appears to partake of the character of a plea of the statute of limitations or of estoppel. It is as follows: "That the suit of William G. Ross vs. Andrew Showers et al., in said writ referred to, has been pending before respondent since, to wit, the 12th day of January, 1891, and jurisdiction of respondent in the matter of said suit has not, during all the times since said 12th day of January, 1891, to and until, to wit, the 17th day of March, 1893, been called in question; that during said time respondent has had submitted to it by the parties to said suit, both plaintiff and defendants, numerous questions of fact and of law, and the same have, when so submitted, been decided by respondent without any objection made to the jurisdiction of respondent in the premises." In answer to the foregoing statement, it is sufficient to say the jurisdiction of the trial court is now directly assailed, and, giving counsel's allegations full credit, they avail nothing in resisting such attack.

The present status of the case of *Ross v. Showers*, as disclosed by the facts we have stated, indicate it to be an action to recover the possession of real property, and for an accounting as to the rents, issues, and profits thereof. It also appears that said real property is not situated in the county where the action was commenced and is now pending. For these reasons the superior court of the city and county of San Francisco, where the action was brought, has no jurisdiction over the subject matter. This question was directly passed upon, and the law declared, in the case of *Fritts v. Camp*, 94 Cal. 394, 29 Pac. 867, which decision has been followed in the recent case of *Pacific Yacht Club v. Sausalito Bay Water Co.* (decision filed June 8, 1893), 98 Cal. 487, 33 Pac. 322. The fact that an accounting is asked as to the rents, issues and profits of the warehouses in no way militates against the position that the action is for the recovery of real property. Such is the usual course in that character of action, and the claim for rents and profits is purely incidental to the main relief sought. In a question of the kind here presented, we are bound by the provisions of the constitution; and the provisions of the Code of Civil Procedure pertaining to the matter of a change of venue and the proper county in which to commence actions avail nothing as against the declaration of

the constitution of the state "that all actions for the recovery of the possession of real estate . . . shall be commenced in the county in which the real estate, or any part thereof affected by such action, is situated." As was said in the concurring opinion in the case of *People v. Wong Ark*, 96 Cal. 138, 30 Pac. 1115, upon the jurisdiction of this court: "As the legislature has no power to grant the court jurisdiction, it has no power to deprive the court of jurisdiction. The jurisdiction of the court came from a source of power above and beyond the legislature of the state, and the court can only be deprived of it by the source from whence it came."

For the foregoing reasons, let the writ issue as prayed for.

We concur: De Haven, J.; Harrison, J.; McFarland, J.

CONNOLLY v. CITY AND COUNTY OF SAN FRANCISCO.

No. 14,397; August 22, 1893.

33 Pac. 1109.

Street Improvement—Abandonment by Contractor.—Where a contractor for street improvements, who is to be paid by assessments of benefits, abandons the contract before it is completed, because the assessments made were illegal, he is not entitled to any warrant or assessment thereunder.¹

Street Improvement—Limitation of Actions.—Where a contractor is to be paid for street improvements by assessment of benefits, and the supreme court decides that no legal assessment can be made under the act authorizing the same and the improvements, the personal liability of the city, if any, becomes fixed, and the statute of limitations begins to run not later than the date of such decision, and an action against the city to recover therefor, commenced more than nine years after such decision, is barred.

Street Improvement—Liability of City When No Assessment Possible.—Where a contractor for street improvements is to be paid

¹ Cited without comment in *City of Auburn v. State*, 170 Ind. 535, 84 N. E. 991, the court saying the question was not properly before it as to the right of recovery on a quantum meruit by a contractor under an uncompleted contract.

by assessment of benefits, and he agrees to exempt the city from any liability under his contract, he cannot recover of such city for the improvements, because no legal assessment can be made to pay him therefor.¹

APPEAL from Superior Court, City and County of San Francisco; J. McM. Shafter, Judge.

Action by Peter Connolly against the city and county of San Francisco to recover money alleged to be due on certain contracts for grading streets. From a judgment for defendant, plaintiff appeals. Affirmed.

John J. Coffey for appellant; Garber, Boalt & Bishop for respondent.

PER CURIAM.—On the eighth day of May, 1867, the plaintiff entered into a written contract with George Cofran, superintendent of streets of the city and county of San Francisco, to grade Market street, in that city, from Valencia street to Castro or Seventeenth street. Under the contract the work was to be commenced within thirty days and completed within three hundred and sixty-five days after its date, and the superintendent, “acting in his official capacity,” agreed that on its completion “he will duly make and issue an assessment, and attach a warrant thereto, as provided for in the aforesaid acts (the consolidation act and its amendments), for the expenses of the work,” at a price named per cubic yard. The terms of the contract were further stated as follows: “And it is agreed and expressly understood by the parties to this agreement that in no case, except where it is otherwise provided in the acts aforementioned and referred to, will the said city and county of San Francisco be liable for any portion of the expense of the work aforesaid, nor for any de-

¹ Cited and approved in *Union Trust Co. v. State*, 154 Cal. 726, 24 L. R. A., N. S., 1111, 99 Pac. 187, as authority that, “son far as this state is concerned, it must be taken to be settled that a provision in the contract that the city shall not be liable, will prevent any recovery against such city if the assessments, for any reason, fail to discharge the cost of the work.”

Cited in the note in 32 L. R. A., N. S., 164, on the liability of a municipality which is unable or has failed to enforce assessments for local improvements.

linquency of the persons or property assessed." The plaintiff commenced work and expended a considerable sum of money pursuant to the terms of his contract, but, before the time for its completion had arrived, he discovered that a portion of the line of the street to be graded was the private property of individuals, who refused to recognize the validity of his contract, or to be bound thereby; and thereupon he petitioned the board of supervisors to take such action as would save him harmless. Five extensions of the time to complete the contract were thereafter granted, aggregating 1,065 days, and extending down to April 18, 1871, but he did not in fact complete the work until November, 1871, about seven months after the expiration of the time extended, and after the contract had become extinguished by his failure. On April 2, 1870, an act was passed by the legislature entitled "An act to authorize the board of supervisors of the city and county of San Francisco to open and grade Market street, in said city, from the intersection of said street with Valencia street to its intersection with Seventeenth street, and to condemn private property for the roadway of said street": Stats. 1869-70, p. 626. By this act the board was "authorized and required to cause Market street, . . . from its intersection with Valencia street to its intersection with Seventeenth street, to be opened and graded; . . . and wherever the line of said Market street, as now projected upon the official map of said city, between said points of intersection, crosses or passes over land the private property of any person, and which has not heretofore been dedicated to the public as a part of said street, and any portion of such land is necessary to be included within the limits of such street, it shall be the duty of said board of supervisors to proceed as herein directed for the condemnation of said land so included within the limits of such street." The act provides that the board shall, within twenty days after its passage, cause a petition to be filed in the county court of the city, describing the property necessary to be condemned, and stating the names of the owners. Notice to such owners and a hearing are then provided for, and if, upon such hearing, the court is satisfied that the lands are necessary or proper for the opening of said street, it is to appoint commissioners to ascertain and assess the compensation to be paid for the land condemned, such

payment to be made out of the first moneys received under the special assessment provided for by the act; and that, immediately upon the filing of the petition for condemnation, the city and county, "shall and may, by its agents, employees, or contractors, enter into and upon" the land, "and proceed to grade and open the same as a public street, as fully, to all intents and purposes, as they might or could do after the confirmation of said commissioners' report, and the actual payment of the compensation therein provided for"; and that "it shall be the duty of the board, . . . within thirty days after the passage of this act, to cause notice of the proposed work to be published, . . . inviting sealed proposals for the work of grading Market street, . . . and the duty of the superintendent of public streets and highways . . . to enter into a contract with the person to whom the contract shall have been awarded." The act defines the district deemed to be benefited by the work, and makes it the duty of the board of supervisors, after the completion of the work, to appoint commissioners to assess such benefits, and also makes it the duty of the said commissioners to determine the value of the work done upon Market street by the plaintiff under the contract of May 8, 1867, and to add thereto the expenses incurred by plaintiff in building railroad tracks, cars, and other appliances that he may have deemed necessary in the performance of his work, and to allow him interest on the whole amount found due at the rate of one and one-half per cent per month from the eighth day of May, 1868, until the filing of the report of the commissioners. The said commissioners were also required to "assess the actual amount due for the work of opening and grading authorized and directed to be done," together with the amounts awarded as compensation for land appropriated and the costs of the proceedings upon the several lots benefited within the district defined, in proportion to the benefit deemed to have accrued to each lot. The act also, in section 22, provides that the tax collector shall, at the end of every ten days after the receipt by him of said assessment-roll, "pay over to the treasurer of said city and county the amount of money collected by him within the preceding ten days upon said assessment; and, as soon as a sufficient sum has been received by said treasurer, he shall pay to the said Connolly the amount of money which may be

awarded to him by the commissioners' report as aforesaid"; and, after paying the other charges as provided for, the said treasurer shall pay over to the superintendent of streets the residue, "and the said superintendent shall immediately pay the same in like gold coin to the person or persons entitled to receive the same, as hereinbefore directed, until the full amount due for said work, as per contract hereinbefore authorized, is paid and discharged."

In November, 1870, proposals for the work to be done under this act of the legislature were advertised for, and upon a bid of plaintiff therefor the contract was awarded to him; and on November 22, 1870, a contract was entered into between plaintiff and M. C. Smith, superintendent of streets. It is recited therein that Connolly has been awarded the contract for the work, under and pursuant to the act of the legislature of April 2, 1870, above referred to; and Connolly agrees with Smith, "as such superintendent, acting under and in pursuance of said act of the legislature, and in conformity therewith, that he will do and perform" the work specified within nine months from the date of the contract, "as provided and conditioned in section 13 of said act." Then follows a provision for Connolly's payment as follows: "And it is agreed and expressly understood by the parties to this agreement that payments for the said work shall be made as provided in section 22 of the said act hereinbefore referred to, and that the said superintendent of the said city and county of San Francisco shall not be otherwise made liable therefor than is provided in and by said act." Pursuant to this contract the plaintiff commenced, and on November 22, 1871, completed, the work to be done thereunder, and the same was accepted by the superintendent of streets. As required by the act, a petition was filed and proceedings had in the county court, and the said court determined that the lands described in the petition were necessary for the opening of the street, and appointed commissioners, as directed, to ascertain and assess the compensation to be paid to the owners thereof. Subsequently these commissioners made their report as to the ownership and compensation to be paid for said lands. In due course, also, the three commissioners to assess the benefits and to determine the amount to be awarded to the plaintiff under his first contract, and the amount due for his work

under his second contract, as required by the act, were appointed and organized as a board. To these commissioners the plaintiff presented his claims under both contracts, and the same were allowed for certain specified sums. The report of the commissioners to the county court was by that court set aside on March 6, 1873, and it was "ordered that no further proceedings be had in the premises, on the ground that no valid assessment could be made under the act." From this order an appeal was taken to this court, where the order was affirmed in January, 1875: *In re Market Street*, 49 Cal. 546. On March 17, 1884, plaintiff presented to the board of supervisors of defendant his claim for the amounts alleged to be due him under his said contracts, and demanded in writing payment thereof, but the board rejected the claim, and refused to pay the same, or any part thereof. Thereafter, on April 3, 1884, plaintiff commenced this action to recover the amount so claimed to be due, with interest.

The defendant by its answer denied most of the averments of the complaint, and alleged that the causes of action set forth therein were barred by the provisions of sections 337, 338 (subdivision 1), 339 (subdivision 1), and 343, Code of Civil Procedure, and also by the provisions of section 90 of the consolidation act.

The case was tried by the court without a jury, and, among other things, the court found that the action was barred by the provisions of each of the sections of the code pleaded, and also by the provisions of the section of the consolidation act pleaded; the findings upon these issues being numbered 12-16. Judgment was accordingly entered that the plaintiff take nothing by his action, from which judgment and an order denying a new trial he has appealed.

The only specifications of the particulars in which the evidence is alleged to be insufficient to justify the findings above referred to are as follows: "The defendant having failed to give to the plaintiff the warrant and assessment agreed upon in the first contract, and having failed to pay, or cause to be paid, the sum for the second contract, in this findings 12-15 are not supported by the evidence. There being no evidence, either on the part of the plaintiff or the defendant, that the claim sued upon in this action was one of the class mentioned in section 90 of the consolidation act, finding 16 is not sup-

ported by the evidence." Under these specifications the findings and judgment cannot be disturbed. The first contract was never completed by the plaintiff, and he therefore never became entitled to any warrant and assessment thereunder: *Mahoney v. Braverman*, 54 Cal. 570; *Fanning v. Schammel*, 68 Cal. 428, 9 Pac. 427; *Raisch v. City of San Francisco*, 80 Cal. 1, 22 Pac. 22. The amounts awarded the plaintiff by the commissioners and due him under the second contract were to be paid as provided in the act of April 2, 1870. Those amounts became due and payable when the work was completed and accepted by the superintendent of streets in November, 1871, and, if any personal liability on the part of the defendant to pay them thereafter arose, because no valid assessment for their payment was or could be issued, that liability became fixed and certain as early at least as January, 1875, when the decision of this court in the case of *In re Market Street*, *supra*, was rendered. The statute of limitations then, if not before, began to run, and the causes of action were barred long before the complaint was filed in 1884.

There is another ground, also, on which the decision of the court below might have been safely rested. By the terms of each of the contracts the plaintiff expressly agreed to the exemption of the defendant from any liability thereunder, and thereby, as against the defendant, waived all legal claims to the money now sought to be recovered. These agreements were made and still are binding on the plaintiff, and he cannot now escape their consequences: *Conlin v. Board* (decided July 21, 1893), 99 Cal. 17, 37 Am. St. Rep. 17, 21 L. R. A. 474, 33 Pac. 753.

In view of what has been said, it is not necessary to consider the other points discussed by counsel. The judgment and order must be affirmed, and it is so ordered.

HILDRETH v. WILLIAMS.

No. 19,125; August 25, 1893.

33 Pac. 1113.

Promissory Note—Attorney Fee—Pledge.—Statutes of 1873-74, page 707, providing that "in all cases of foreclosure of mortgage the attorney's fee shall be fixed by the court, . . . any stipulation in said mortgage to the contrary notwithstanding," relates only to mortgage foreclosures, and does not apply to an action to enforce a pledge.¹

Promissory Note—Amount of Attorney Fee.—Where a stipulation in a note for an attorney's fee in case the note is sued on does not fix the amount of such fee, a reasonable sum therefor will be allowed.²

APPEAL from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Hugh R. Hildreth against Henry A. Williams. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Oscar A. Trippet for appellant; Conklin & Hughes for respondent.

SEARLS, C.—This is an appeal from a judgment in favor of plaintiff for \$350, as an attorney's fee in an action in equity to enforce a pledge upon certain stocks given to secure the payment of a promissory note made by defendant to plaintiff for \$3,500. The case comes up on the judgment-roll. The promissory note was in the usual form, with this addition: "And I further agree that, in the event of suit being brought against me, then there shall be added to any judgment against me, rendered in said suit, as counsel fees, an additional sum of ——— per centum, in like gold coin, upon

¹ Cited with approval in *Mason v. Luce*, 116 Cal. 238, 48 Pac. 73, where it is held that if the note stipulates for payment of attorneys' fees, and the mortgage does not secure the payment by its terms, a personal judgment for such fees may be rendered in the foreclosure suit, notwithstanding the silence of the mortgage on the subject.

² Cited and followed in *McCornick v. Swem*, 36 Utah, 12, 102 Pac. 628, which holds that a stipulation in a note for an attorney's fee, no amount being mentioned, justifies the recovery of a reasonable fee.

the amount of the principal and interest hereof accrued at the time of the entry of such judgment, or if paid before judgment, and after action commenced, then on the amount at the date of payment." The only defense was as to the right of plaintiff to recover the counsel fee claimed in his complaint, and at the trial the amount claimed on the note, less counsel fees, was paid by defendant, and a stipulation filed that such payment should in no wise affect the question of plaintiff's right to recover counsel fees.

The whole right to recover counsel fees, in this state, is found in statute, or in contract: *Sichel v. Carrillo*, 42 Cal. 508; *Mascarel v. Raffour*, 51 Cal. 242. Section 1 of the act of March 27, 1874 (Stats. 1873-74, p. 707), provides that: "In all cases of foreclosure of mortgage the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding." In *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514, the court doubted the right of the court to fix an attorney's fee, under this statute, in a case in which the mortgage failed to provide for a fee, and that the statute operated to limit the fee which the court could allow in a case where the parties had agreed upon a sum to an amount not greater than the sum so fixed; in other words, that the court can scale the agreed sum down, but not up. The reason given in that case for confining the action of the court to cases in which the parties have provided for an attorney's fee is that the title of the act is, "An act to abolish attorneys' fees, and other charges in foreclosure suits"; thus evincing an intention to abolish rather than to provide by law for their recovery. The statute, whatever its construction, only treats of attorney's fees in actions of foreclosure of mortgages, and has no application to this case, which is an action to enforce the lien created by a pledge of personal property.

The question here must turn upon the contract contained in the promissory note. That contract provides that there shall be added to the judgment, or, if paid before judgment, and after action commenced, to the amount due, as counsel fees, "an additional sum of — per centum." In other words, the agreement is for a counsel fee, but the amount thereof is not provided. The contracting parties doubtless had in view the necessity of counsel in the event of proceed-

ings in court to enforce the obligation of the promissory note, and the maker of the note agreed to pay such counsel, in manner and form as quoted. In contracts for services, where the remuneration is not fixed by agreement, a recovery may be had upon a quantum meruit; that is to say, as much as the services are reasonably worth. If the clients of the learned counsel in this case have employed them herein, and agreed to pay them a counsel fee, without specifying the amount to be paid, it will doubtless occur to them that they are entitled to such sum as their services are reasonably worth. In principle, the case at bar does not differ from the example put. The contingency upon which the liability of defendant depended occurred when, at maturity, the note was not paid, and an action was commenced to enforce its collection. The amount of the counsel fee not having been stipulated, the plaintiff, in his complaint, averred that \$500 was a reasonable sum. The court, as was its duty, passed upon the question, and awarded \$350 as a proper amount. The evidence is not brought up, and hence we must conclude that it supported the findings upon this issue, and such findings are ample to support the judgment. *Rickards v. Hutchinson*, 18 Nev. 215, 2 Pac. 52, and 4 Pac. 702, was a case almost precisely like the present. The mortgage provided for the allowance of counsel fees "at the rate of — per cent upon the amount which may be found to be due for principal and interest"; and the court said: "The allowance of counsel fees for the foreclosure was authorized by the terms of the mortgage." *Alden v. Pryal*, 60 Cal. 215, is another case in point, and the ruling was against the contention of appellant here. It is true these last two cases were upon the foreclosure of mortgages, but the decisions turned, not upon that fact nor upon any statute, but upon the contract which had been entered into by the mortgagors. The judgment appealed from should be affirmed.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

DAW v. NILES et al.*

No. 19,140; August 25, 1893.

33 Pac. 1114.

Parol Evidence—Illegality of Contract.—In an Action to Foreclose a mortgage given by defendant to secure a note for money loaned to him by plaintiff, defendant may show by parol evidence that at the time of executing the note and mortgage it was agreed, as part of the same transaction, that defendant should pay all taxes levied on the money loaned, or on the mortgage, but that the agreement was purposely omitted from the mortgage, in order to evade Constitution, article 13, section 5, which provides that imposing such an obligation on a borrower shall avoid the contract, as to any interest specified therein, as such parol evidence tends to "establish illegality" of the contract, within Code of Civil Procedure, section 1856, prescribing when such evidence is admissible to affect a writing.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by George W. Daw against William Niles and John B. Niles to foreclose a mortgage. There was a judgment for plaintiff and defendants appeal. Reversed.

A. W. Hutton and Minor & Woodward for appellants; Albert M. Stephens for respondent.

VANCLIEF, C.—Action to foreclose a mortgage executed by defendants to secure their promissory note to plaintiff for \$10,000, with interest at seven per cent per annum, and payable ten years after date; the interest, if not paid annually, to be compounded. The note further provides that, if the interest is not paid annually, "then the whole sum of principal and interest shall become immediately due and payable, at the option of the holder." The note was given for money loaned. The mortgage, of the same date as the note (July 1, 1887), contains a copy of the note, and provides that "in case of default in payment of the same [the note], or of any installment of the interest thereon, when due, the mortgagee may foreclose this mortgage, and may include in

*For subsequent opinion in bank, see 104 Cal. 106, 37 Pac. 876.

such foreclosure a reasonable counsel fee, to be fixed by the court, together with all payments made by the mortgagee for taxes on said premises, other than the taxes on this mortgage, or the money secured thereby. . . . ” The defendants having made default in the payment of interest, the plaintiff exercised his option by electing to consider both principal and interest due, and commenced this action on March 27, 1891. The defendants pleaded as a defense to the action that at the time of the execution of the note and mortgage, and as a part of the same contract and of the same transaction with the making of the note and mortgage, it was agreed by and between the plaintiff and defendants that the defendants “should and would pay and discharge all taxes and assessments which might be assessed or levied upon said money so loaned by plaintiff to defendants, and on said mortgage, or on either said money or mortgage, anything in the said promissory note or mortgage to the contrary notwithstanding, and that said agreement was knowingly made and omitted from said mortgage with intent to evade the provisions of section 5 of article 13 of the constitution of this state.” And by reason of this agreement defendants deny that any interest ever became due or payable on the note, and, as a conclusion of law, claim that the action was prematurely commenced. The decree was in favor of the plaintiff, foreclosing the mortgage for the full amount of principal, with compound interest. The defendants appeal from the judgment on the judgment-roll, containing a bill of exceptions showing that defendants offered to prove the alleged contemporaneous agreement to pay the taxes and assessments on the mortgage by oral evidence, which was rejected by the court on the ground that such agreement could be proved only by written evidence, and the defendants excepted to this ruling of the court. Counsel for appellants contend that the court erred in rejecting the proffered oral evidence to prove the alleged agreement, and this raises the only question that need be considered.

The only substantial difference between this case and the late case in this court of *Burbridge v. Lemmert*, 99 Cal. 493, 32 Pac. 310, is that in that case the concurrent agreement to pay the taxes on the mortgage was in writing. In that

case it was held that the written agreement was in contravention of section 5 of article 13 of the constitution of this state, and subjected the mortgagee to the penalty denounced by that section, namely, that the note and mortgage, as to any interest specified therein, "shall be null and void," and, consequently, that no interest ever accrued or became due, and the failure of the mortgagor to pay the interest specified in the note or mortgage was not such a default as entitled the mortgagee to treat the principal as due before the expiration of the term of credit expressed in the note (in this case ten years after the date of the note). I think the court erred in rejecting evidence of that part of the contract which was oral. The "contract," in the sense of section 5, article 13, of the constitution, existed as an entirety, independently of any writing, though parts of that contract were evidenced by writing. Indeed, writing is no part of any contract, though it is often made evidence of contracts; and, according to some general rules, certain classes of contracts can be proved only by written evidence, but to all these general rules there are exceptions. As an example in point here, section 1856 of the Code of Civil Procedure provides: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore, there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases: '(1) Where a mistake or imperfection of the writing is put in issue by the pleadings. (2) Where the validity of the agreement is the fact in dispute; but this section does not exclude other evidence . . . to establish illegality or fraud.' " In this case the express and only object of proving that part of the contract which is alleged to have been omitted from the writing for the purpose of evading the constitution was to show the illegality, and consequent nullity, of the note and mortgage, "as to any interest specified therein": See, also, Wharton on Evidence, sec. 935; Greenleaf on Evidence, sec. 284; *Buffendeau v. Brooks*, 28 Cal. 641. The purpose of section 5 of article 13 of the constitution, so far as it goes, is on a line with the object of the usury laws of other states, and therefore the decisions of other states in respect to attempted evasions of usury laws are more or less

applicable to this case. Of these, the following seem very aptly in point: *Clark v. Badgley*, 8 N. J. L. 233; *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234, 49 N. W. 55. I think the judgment should be reversed and the cause remanded for a new trial.

We concur: Temple, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded for a new trial.

DUPUY *v.* MACLEOD.

No. 19,118; August 25, 1893.

33 Pac. 1115.

Statute of Frauds—Signature of Party to be Charged.—The fact that a contract for the sale of chattels is reduced to writing does not, under the statute of frauds, render necessary the signature of the party to be charged, where the requirement of a writing was obviated by an immediate delivery of the goods sold.

APPEAL from Superior Court, Los Angeles County; W. N. Clark, Judge.

Action by E. Dupuy against Malcolm Macleod to recover for goods sold and delivered. There was a judgment in favor of plaintiff, and defendant appeals. Affirmed.

C. W. Pendleton for appellant; O'Melveny & Henning for respondent.

SEARLS, C.—This action was brought to recover the sum of \$500, the balance due on a sale of stock of merchandise and store fixtures sold and delivered by the plaintiff to defendant, at Los Angeles, May 31, 1890. The real question in issue is this: Plaintiff avers the sale was made for \$1,500, to be paid as follows: \$1,000 in cash, the remaining \$500 to be paid as follows: When \$100 worth of stock was sold, \$20

to be deducted by defendant as commissions, and \$80 paid to plaintiff, and so on until the \$500 was paid. If the stock sold did not amount to sufficient to pay plaintiff \$500, after deducting twenty per cent, plaintiff was to receive the eighty per cent of proceeds in full payment. He avers the sale of sufficient stock to entitle him to full payment under this agreement, and the evidence sustains him in this last assertion. Defendant avers that the agreement was that the \$1,000 paid in cash was first to be deducted from the proceeds of sales, before any further payments were made, and then payments were to be made as averred by plaintiff; and he avers that \$1,000 had not been realized from the sales when the action was brought, and hence that nothing was due. Conceding his theory to be correct, the evidence sustains his position that \$1,000 had not been realized from sales. It is admitted on all hands that the sum of \$1,000 was paid by defendant to plaintiff at the date of the sale, and that the defendant went into possession of the property at once, and has ever since retained the same. Plaintiff had judgment, from which, and from an order denying a new trial, this appeal is prosecuted.

The first error assigned by appellant is that the court did not find upon all the issues made by the pleadings, and (1) that it did not find upon the facts set forth by defendant in his second and separate answer. The facts set up in the separate defense were that the agreement was that defendant was first to appropriate from the proceeds of sales the \$1,000 cash, as before stated, before any proceeds were to go to plaintiff. The finding was quite full on the point, and fully sustained the allegations of the complaint. It was not necessary for the court, after finding that the agreement was that defendant was to keep an accurate account of all sales, and, when the sales amounted to \$100, \$80 thereof was to be paid to plaintiff, and \$20 retained by defendant, etc., to go on, and find, as a negative proposition, that they did not agree as set out by defendant. It was conceded that an agreement was made. Just what that agreement was, was the point submitted to the court, and the finding specifies it distinctly, and passes upon the question.

It is further objected that the court failed to find upon the fourth allegation of the complaint, which was denied by

the answer. The substance of this allegation is that the agreement of sale was reduced to writing and signed, and that the writing was in the possession of defendant. The agreement had been pleaded, and this allegation was evidently inserted for the purpose of showing, as is often done, that it was out of plaintiff's possession, and as a predicate for an amendment, if it should turn out different from the pleading, and also for the purpose of giving to the defendant notice that it would be relied upon in sustaining plaintiff's cause of action. The important question was, Was there a sale, and what were its terms? These questions were fully passed upon, and it was unnecessary to go further. There was a finding upon all the material issues, which is sufficient.

It is next contended that the court erred in admitting in evidence what is termed a "written memorandum of the contract," which is the contract of sale alluded to in the complaint, and is in the following language:

"Los Angeles, Cal., May 31, 1890.

"I have this day sold my entire interest in the seed, feed, produce, commission, and all business of whatever nature, carried on at the store 245 South Main street, Los Angeles, to Malcolm Macleod, on the following terms, viz.: The price to be one thousand cash in hand paid, the receipt of which is hereby acknowledged, and five hundred dollars to be paid in the following manner: A correct account to be kept of all goods sold, and when sales to the amount of (\$100) one hundred dollars are made, after deducting twenty per cent commission for selling the same, (\$80) eighty dollars to be paid over to E. Dupuy or order, and the same to be done until the full amount of five hundred dollars, net, is paid; provided so much can be sold from the stock now on hand, belonging to said Dupuy; but if there is not enough stock on hand to come to the amount of five hundred dollars, net, then the said Dupuy to accept the amount the stock sells for, as full compensation. The stock and fixtures turned over to M. Macleod is now in the store at 245 South Main street, and is entered on an invoice book, May 13, 1890, which book is marked 'A,' with the exceptions of some that has been sold from the same since that time, which is fully understood by said Macleod.

"Witness: J. M. HIXSON."

"ED. DUPUY.

The instrument was admissible in evidence. There was evidence that it was drawn by J. M. Hixson, who witnessed it, at the store where the sale was made, at the request of the defendant, and at the time of the sale and delivery of the goods; that the consideration of \$1,000, mentioned therein, was paid at the time; and that the bill of sale was left by Dupuy, the vendor, after signing it, on the desk; and that it remained in the possession of defendant until the trial, when, upon notice to him so to do, he produced it. As evidence to avoid the statute of frauds, it was defective, in not being signed by defendant Macleod, the party to be charged thereby. The statute of frauds, however, was not pleaded, and, if it had been, the plea would have been of no avail, under section 1973 of the Code of Civil Procedure, because there was an immediate delivery of all the goods sold to the purchaser, who thereafter retained possession, and a payment of \$1,000, being part of the purchase price, to plaintiff. A writing to satisfy the statute of frauds is one thing. A writing which is admissible in evidence as to some of the facts of a sale is, or may be, quite a different thing. Beyond determining what shall be a sufficient compliance with the statute, the legislature has not attempted to change the principles of the law of evidence relating to written contracts. "Parties entering into any contract may either reduce its terms to writing, or may refer to some other writing, already in existence, as containing the terms of their agreement; and when they do so they are bound by what is written, whether signed by them or not": Benjamin on Sales, see. 201. This, of course, assumes that the parties assent to the contract as written. Had plaintiff made an oral statement to defendant, precisely as contained in the writing, it would have been admissible in evidence. The fact that he made it in writing, and gave it to, or left it with, defendant, does not render it less admissible. There was sufficient evidence of assent on the part of defendant to entitle the instrument to admission in evidence. There was also evidence upon the part of defendant tending to show that he never assented to the agreement, as set out. Not having been signed by him, this was proper; and it remained for the court to pass upon the issue thus raised, which it seems to have done to the exclusion of the defendant's theory. There was a substantial conflict in

the evidence and evidence sufficient to support all the findings of the court, and the judgment and order appealed from should be affirmed.

We concur: Temple, C.; Vancief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

BITUMINOUS LIME ROCK PAVING AND IMPROVEMENT COMPANY v. FULTON et al.

No. 14,907; August 25, 1893. .

33 Pac. 1117.

Evidence—Judicial Notice of City.—The courts will take judicial notice that the city of Los Angeles is a municipal corporation, by virtue of the several statutes organizing it into such corporation, and extending its limits, and adding to and changing the powers of its officers.¹

Street Improvement.—An Averment That “the City Council of the city of Los Angeles passed a resolution of intention that New High street, in said city, be paved,” is a sufficient averment that such street is an open public street; Statutes of 1885, page 147, section 1, providing that “all streets in the municipalities of this state now opened or dedicated, or which may hereafter be opened or dedicated, shall be deemed and held to be open public streets, and the city council of each municipality is hereby invested with jurisdiction to order to be done thereon any of the work mentioned in” the act.²

Street Improvement—Enforcement of Lien—Pleading.—Code of Civil Procedure, section 456, provides that in pleading the determination of a board or officer the facts conferring jurisdiction need not be

¹ Cited in *Stoner v. Los Angeles*, 8 Cal. App. 610, 97 Pac. 694, in proceedings relative to assessments for opening streets.

Cited and followed in *Drew v. Butte*, 44 Mont. 126, 119 Pac. 280, which was a suit against a city for damages to property caused by a change of grade of a street.

² Cited in dissenting opinion in *Buckman v. Hatch*, 139 Cal. 59, 72 Pac. 447.

stated, but such determination may be stated to have been duly given or made. Held, that, in an action to enforce the lien of a street-paving assessment, an averment "that all the several acts required to be done by said city council, said superintendent of streets, and this plaintiff have been duly done, made, and performed by it and them, in the manner and at the times and in the form required by law," is sufficient on general demurrer.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by the Bituminous Lime Rock Paving and Improvement Company against J. E. Fulton and others to enforce a lien for street assessments. There was a judgment in favor of defendant Henderson, and plaintiff appeals. Reversed.

Jay E. Hunter for appellant; Jones & Carlton for respondents.

SEARLS, C.—The plaintiff in this cause appeals from a final judgment entered in favor of defendants. The action was instituted in the superior court in and for the county of Los Angeles to enforce a lien against certain property of the defendants, described in the complaint, which lien was created by an assessment made by the street superintendent of the city of Los Angeles, to obtain payment for certain work done under an act entitled "An act to provide for work upon streets," etc., "within municipalities," approved March 18, 1885, as amended March 14, 1889, and known and designated as the "Vrooman act": Stats. 1885, p. 147; Stats. 1889, p. 157. A demurrer was interposed to the complaint, which demurrer was sustained by the court, and, plaintiff declining to amend, final judgment was entered in favor of the defendant Charles Henderson. The demurrer was general, and averred that plaintiff's complaint "fails to state facts sufficient to constitute a cause of action against these defendants." The particular reasons moving the court below to sustain the demurrer do not appear in the record, and we can only divine them by a perusal of the complaint, aided by the suggestion of causes therefor contained in the briefs of counsel.

It is urged by respondents that the complaint fails to aver that the city of Los Angeles is a municipal corporation, or

that New High street is an open public street. The allegation of the complaint is "that . . . the city council of the city of Los Angeles, state and county aforesaid, passed a resolution of intention . . . that New High street, in said city, from the north line of Franklin street to the south line of Temple street, . . . be paved and curbed," etc. The court will take judicial notice that the city of Los Angeles is a municipal corporation under and by virtue of several statutes of this state, duly passed for the purpose of organizing it into such corporation, and extending its limits, adding to and changing the powers of its municipal officers, etc.: Code Civ. Proc., sec. 1875.

A street is a "public thoroughfare or highway in a city or village": Black's Law Dictionary, tit. "Street." A street is something more than a highway, for, besides its use as a highway for travel, it may be used for the accommodation of drains, sewers, aqueducts, water and gas pipes, and for other purposes conducive to the general police, sanitary, and business interests of a city: Bouvier's Law Dictionary. It is a public highway of a city or village, over which all the citizens of the land have a right to pass and repass at pleasure: State v. Moriarty, 74 Ind. 104; Perrin v. Railroad Co., 36 N. Y. 126; Kelsey v. King, 33 How. Pr. (N. Y.) 43; City of Quincy v. Jones, 76 Ill. 244, 20 Am. Rep. 243. Section 1 of the act of 1885 (Stats. 1885, p. 147) provides that "all streets . . . in the municipalities of this state now open or dedicated, or which may hereafter be opened or dedicated, shall be deemed and held to be open public streets . . . for the purposes of this act, and the city council of each municipality is hereby . . . invested with jurisdiction to order to be done thereon any of the work mentioned in section two of this act." Section 2 of the act, as amended in 1889 (Stats. 1889, p. 157), authorizes the city council to order work done upon the streets, of the character in question in this case. The evident object of the first section of the statute of 1885 was to enlarge the term "street," so as to include, not only those that had been opened, but those also dedicated to street purposes, although not formally or officially accepted or opened as such. The effect was simply to make streets of a class which might not otherwise come within that category. When plaintiff, in its complaint, averred the passage of a resolution to pave and

curb New High street, in said city, it was as comprehensive as the definition of the term "street," and was tantamount to an averment that it was an open public street in said city.

The complaint, critically considered, is defective, in this: that many of its statements of facts are not full and explicit, but the demurrer is general. Where a complaint fails to state facts essential to a recovery, the defect may be reached by a general demurrer. Where, however, it states all the essential facts, but states them defectively, the error can only be reached by a special demurrer. Again, several of the apparent defects in regard to publication of notices, etc., are cured by the twelfth paragraph of the complaint, which avers "that all the several acts required to be done by said city council, said superintendent of streets, and this plaintiff have been duly done, made, and performed by it and them, in the manner and at the times and in the form required by law," etc. Section 456 of the Code of Civil Procedure provides that, in pleading a determination of a board or officer, it is not necessary to state the facts conferring jurisdiction, but such determination may be stated to have been duly given or made, etc.: *Babcock v. Goodrich*, 47 Cal. 512; *City of Los Angeles v. Waldron*, 65 Cal. 283, 3 Pac. 890; *Pacific Paving Co. v. Bolton*, 97 Cal. 8, 31 Pac. 625. Applying this rule to the jurisdictional facts, so far as the city council and street superintendent are concerned, and the complaint, although far from perfect, was impervious to the general attack made upon it. To mention the several objections of respondent in detail would subserve no useful purpose. The judgment appealed from should be reversed and the court below directed to overrule the demurrer to the complaint, with leave to defendant to answer.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is reversed and the court below is directed to overrule the demurrer to the complaint, with leave to defendant to answer.

PERKINS v. WEST COAST LUMBER COMPANY.

No. 19,124; August 25, 1893.

33 Pac. 1118.

Attorney—Action for Services—Damages for Negligence.—In an action for services as an attorney between certain dates, a finding of damages for defendant because of negligent advice given defendant at a time prior thereto must be disregarded, such negligence not having been pleaded.

Attorney—Action for Services—Amendment on Appeal.—Where the value of services sued for is found to be more than alleged in the complaint, the latter cannot be amended on appeal to conform to the findings.

APPEAL from Superior Court, San Bernardino County;
John L. Campbell, Judge.

Action by C. J. Perkins against the West Coast Lumber Company for attorneys' fees. From a judgment for defendant, plaintiff appeals. Reversed.

Paris & Fox and Rolfe & Freeman for appellant; Harris & Gregg for respondent.

TEMPLE, C.—Plaintiff appeals upon the judgment-roll. The points presented arise upon the pleadings and the findings of the court. Plaintiff sues for services as an attorney and counselor at law. His complaint states three causes of action. In the first it is alleged that defendant contracted with him June 1, 1888, for his services, agreeing to give him \$35 per month as a general retainer, and as compensation for writing letters, adjusting claims, and for advice, and agreed to pay a reasonable compensation for services in prosecuting and defending suits; that he performed the general services until March 1, 1890, which were worth \$735, and also performed other services during the same period in prosecuting and defending suits and drafting instruments for defendant worth \$3,044.75; that he has been paid on account of such services \$1,865.15. The second cause of action is for \$116.20, money laid out and expended for defendant. The third count

is a quantum meruit to recover for services alleged to have been rendered between June 1, 1888, and April 1, 1890, worth \$4,079.75, and admitting a payment on account thereof of \$1,865.15. Plaintiff demands judgment for \$1,981.35. The answer consists of (1) a general denial; (2) an averment of a contract different from that alleged by plaintiff, with a plea of payment; (3) another statement of the contract between the parties, with a claim of full performance on the part of defendant; and (4) a counterclaim for goods sold plaintiff amounting to \$2,867.10, of which \$1,574.60 has not been paid. Defendant demands judgment in the sum of \$1,574.60. The court finds the contract as it is averred by plaintiff. It also finds the value of the services on the general retainer to be \$735, and for the other services \$3,228.53, and that plaintiff laid out and expended for defendant the sum of \$116.20; total, \$4,079.73. It also finds that plaintiff is indebted to defendant for goods sold in the sum of \$1,332.28. Plaintiff admits in his complaint payment of the sum of \$1,865.15. There is no finding in regard to this matter. The court did find, however, that on the seventeenth day of April, 1888, which was prior to the employment alleged in the complaint, to which the other findings refer, plaintiff was employed by defendant in regard to its claim against one Newman, and in such employment so negligently advised the defendant in regard to the said demand that defendant lost the sum of \$3,408.77, which sum it finds is justly due defendant as damages, and thereupon, as a conclusion of law, finds that defendant is entitled to judgment against the plaintiff in the sum of \$661.40, for which, with costs, judgment was entered.

The appellant contends here that the finding in regard to the damages resulting to defendant through the alleged negligence of the plaintiff must be disregarded, because it is not responsive to any issue in the case, and that plaintiff should be permitted to so amend his complaint that it will sustain a judgment for the sum of \$2,747.47, which the findings show is due plaintiff, if the finding in regard to the alleged damage be stricken out. The first part of this contention I think must be sustained. There is no allusion to the alleged negligence in any pleading, and there is therefore nothing to support the finding of the damage as a counterclaim. The alleged negligence was not in the performance of any part of the services

for which suit is brought, and therefore, if the contention was well founded, did not affect the value of those services. Even if it were conceded that the claim for such damage by defendant is a cross-demand, within the meaning of section 440 of the Code of Civil Procedure, it would still be necessary to plead it under the circumstances of this case. It cannot be considered the debit side of the account sued on. It is an unliquidated demand for damages. But it does not follow that plaintiff is entitled to judgment on the findings for the balance that will then appear to be due. Leave might as well be granted the defendant to amend its pleading to cover the judgment already entered. I think the fairest thing will be to remand the case for a new trial, when the trial court can allow such amendments to be made to the pleadings as will be conducive to justice.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and cause remanded for a new trial, with leave to the parties to amend their pleadings as they may be advised.

CHARLTON v. SOUTHERN PACIFIC R. CO.

No. 14,921; August 25, 1893.

33 Pac. 1119.

Quieting Title.—Mere Possession of Land Within the Limits of a grant to a railroad company, which had complied with the terms of the grant, but had not received a patent from the United States, will not enable such person to maintain an action to quiet title against the railroad company, where he does not show that he was qualified to take land under the pre-emption or homestead laws, or that he settled on it with the intention of filing a pre-emption or homestead claim.

APPEAL from Superior Court, Los Angeles County; William P. Wade, Judge.

Action by G. G. Charlton against the Southern Pacific Railroad Company to quiet title. There was a judgment in favor of defendant and plaintiff appeals. Affirmed.

Conklin & Dunlap for appellant; Jos. D. Redding and J. D. Bicknell for respondent.

BELCHER, C.—The plaintiff commenced this action on September 30, 1890, to quiet his title as against the defendant to a tract of land in Los Angeles county, described as “fractional section 7, in township 2 north, range 16 west, San Bernardino base and meridian.” The complaint alleged “that the plaintiff is now, and for a long time hitherto has been, in the possession of and is the owner (subject only to the paramount title of the United States) of that certain real property situate,” etc. The answer denied the plaintiff’s possession or ownership of the land described, subject only to the paramount title of the United States, admitted that defendant claimed an interest in and to said property adverse to the plaintiff, and denied that its claim was without right. It then alleged, in substance, that the land in controversy was granted to defendant by act of Congress of March 3, 1871; that a map of definite location of the grant, including the land in controversy, and showing the same to be within the twenty-mile limit of the grant, was filed by defendant in the office of the commissioner of the general land office on April 3, 1891, and that defendant completed its railroad opposite to the said land in 1876; “that by reason of the aforesaid acts this defendant is the owner of the land in controversy, and is entitled to the patent therefor”; “that the said lands and premises have never been finally and completely surveyed by the proper officers of the United States, so that a patent therefor could issue, but this defendant is informed and believes, and so states the fact to be, that, when the proper returns of the survey of said lands are made, a patent will forthwith issue for the said lands and premises to this defendant.” The case was tried without a jury, and the court found: “(1) The plaintiff was not at the time of filing the complaint herein, or for any length of time prior thereto, and is not now, the owner or in possession, subject to the paramount title of the United States, of the land described in the complaint, or any portion thereof;

(2) The land described in the complaint is unsurveyed government land, and within the twenty mile or granted limits of the grant to the Southern Pacific Railroad Company, the defendant herein, made by Congress of the United States, on March 3, 1871; that said grant was duly located by a map of definite location, which was filed by the defendant in the office of the commissioner of the general land office on April 3, 1871; that said map of definite location included the land in controversy, and showed the same to be within the granted limits of said grant to the defendant herein; that the defendant completed its railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to Fort Yuma, opposite the land in controversy, in the year 1876, and had its road fully equipped and in running order in the said year, and has continued to have its road in such condition ever since." Judgment followed in favor of defendant, from which, and from an order denying a new trial, the plaintiff appeals.

In support of the appeal it is contended that the findings do not respond to or cover all the issues raised by the pleadings, and that the first finding, if construed to mean that the plaintiff was not in possession of the premises in controversy at the time the action was commenced, is not sustained by the evidence, and hence that the judgment and order should be reversed. The second finding is not assailed on the ground that the evidence was insufficient to justify it. The only evidence brought up in the record is that of the plaintiff. He testified: "I reside upon fractional section seven," etc. "At the time the complaint in this action was filed, I was in possession of all the premises described therein. I have been in possession of it ever since October, 1889. I am cultivating the land, and raising bees. . . . I know that this land is a part of section seven, for the reason that it has been surveyed, and there is a section corner stake at the southwest part of the land. It is along the border of the San Fernando grant. I believe the survey has been returned, but do not know of my own knowledge. An officer at Washington informed me so." The case then seems to be this: The plaintiff took possession of the land in controversy, and when he had occupied it for less than a year commenced this action to have his title to it quieted. It does not appear that he had the qualifications necessary to enable him to take up any land under the

pre-emption or homestead laws, or that he settled upon this land with any intention to ever file a pre-emption or homestead claim on any part of it. He is in no way in privity with the title, but relies only on his naked possession. Prior to the time of the trial the section had probably been surveyed in the field, but the plat of the survey had not been returned, approved, and filed. The defendant has a grant from the government of all the odd-numbered sections, with certain specified exceptions, within the limits of twenty miles on each side of its railroad. The section in controversy is within the twenty-mile limit, and not, so far as appears, within any of the exceptions. The grant was one in praesenti, and a complete title to the granted sections vested in the grantee as soon as the line of its road was definitely located, and the sections identified by government survey: *Forrester v. Scott*, 92 Cal. 398, 28 Pac. 575; *Jatunn v. Smith*, 95 Cal. 154, 30 Pac. 200, and cases cited. The line of the road opposite this land was definitely located in 1871, and the road was fully constructed and put in running order in 1876. Counsel for appellant say in their brief: "Plaintiff, being in possession of the land in controversy, brought this action for the purpose of determining whether the government or defendant was the owner of the fee." The case was evidently tried upon the theory on both sides that the land in controversy was then, or would be when fully surveyed, an odd-numbered section, and we shall therefore so regard it. This being so, it was immaterial for the purposes of the case whether the fee still remained in the government or had passed to the defendant. Unquestionably the defendant had an estate or interest in the land, which was superior and paramount to any right the plaintiff had by reason of his mere possession. The first finding was, in effect, that the plaintiff was not the owner or in possession of the land, subject only to the paramount title of the United States; and this finding was, in our opinion, fully justified. We advise, therefore, that the judgment and order be affirmed.

We concur: Searls, C.; Vancief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

SULLIVAN v. HUME.

No. 15,104; August 26, 1893.

33 Pac. 1121.

Judgment—Waiver of Written Findings.—Where the clerk of the trial court, through inadvertence, failed to enter on the minutes the fact that the parties, by oral consent, in open court, waived written findings, the court properly directed that the minutes be corrected and amended nunc pro tunc as of the day of the waiver, and denied a motion to set aside the judgment on the alleged ground that written findings had not been waived.

Appeal.—Where There is a **Substantial Conflict** in the evidence, the findings of the trial court will not be disturbed, on appeal, on the ground of insufficiency of evidence to support them.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by Daniel T. Sullivan against one Hume for professional services as attorney at law. From a judgment for plaintiff, defendant appeals. Affirmed.

Estee, Fitzgerald & Miller for appellant; Daniel T. Sullivan in pro. per.

DE HAVEN, J.—This action was brought to recover a balance of \$850 claimed to be due from the defendant for professional services rendered to him by the plaintiff in his capacity as an attorney at law. The plaintiff obtained a judgment in the superior court for \$500, and the defendant appeals.

1. There were no written findings, and the defendant moved the court to set aside its judgment upon the alleged ground that such findings had not been waived. The motion was denied. The record shows that findings of fact were expressly waived by the oral consent of the parties, given in open court at the time of the submission of the case, but the clerk, through inadvertence, failed to enter the fact of such waiver upon the minutes of the court at the time. This appearing, the court did not err in denying the motion of defendant, and

in directing that the minutes of the court be corrected and amended nunc pro tunc as of the day of such waiver, so as to show the real facts in relation thereto. The court had an undoubted right to correct its minutes so as to make them state the truth in relation to the matter, and when this was done the minutes showed a waiver of findings in one of the modes prescribed by section 634 of the Code of Civil Procedure, to wit: "By oral consent in open court, entered in the minutes."

2. Nor can we disturb the judgment upon the ground of the insufficiency of the evidence to sustain the implied finding of the court to the effect that the plaintiff was employed by defendant to act as his attorney in the trial of the case referred to in the complaint. This case comes squarely within the settled rule of this court that, where there is a substantial conflict in the evidence, the finding of the trial court or jury upon the disputed fact is conclusive here. The court below evidently gave credit to the testimony of the plaintiff, and that evidence was certainly sufficient to justify the judgment appealed from. Judgment and order affirmed.

We concur: Garoutte, J.; McFarland, J.

MOWRY v. NUNEZ.

No. 14,533; August 26, 1893.

33 Pac. 1122.

Judgment by Default—Vacation.—Where, in Ejectment, default and judgment were taken and rendered against a tenant without the knowledge of his landlord, a motion to set aside the default and vacate the judgment was properly granted.

APPEAL from Superior Court, Alameda County; W. E. Greene, Judge.

Ejectment by George B. Mowry against Joseph S. Nunez. There was judgment by default for plaintiff. From an order

setting aside the default and vacating the judgment, plaintiff appeals. Affirmed.

R. Percy Wright for appellant; J. E. Simmons and A. A. Moore for respondent.

McFARLAND, J.—This is an appeal by plaintiff from an order made December 1, 1890, setting aside the default of defendant, and vacating a judgment theretofore entered against him. The motion of respondent to open the default was upon the grounds “that said judgment and the said default were taken against him by and through the mistake, inadvertence, and excusable neglect of said Nunez.” Afterward, at the suggestion of the court, another ground was added, viz., irregularity of process, consisting of the issuance of the second summons upon an amended complaint without an order of court allowing it, and the court based its order vacating the judgment upon this latter ground. But the affidavits showing mistake, excusable neglect, etc., were such that the court should have opened the default on that ground, and therefore it is not necessary to discuss the question about the invalidity of the process. This is a case where, in an action of ejectment, default and judgment were taken and rendered against a tenant without the knowledge of his landlord, and in such a case an order vacating a judgment will rarely be disturbed. The order appealed from is affirmed.

We concur: De Haven, J.; Fitzgerald, J.

CLEMENTS et al. v. MCGINN et al.

No. 15,099; August 30, 1893.

33 Pac. 920.

Will—Contest After Probate—Setting Aside in Toto.—Under Code of Civil Procedure, sections 1330, 1331, providing that, where a will is admitted to probate without contest, any person interested may within one year initiate a contest, and if it shall appear that the will is invalid, etc., the probate must be annulled and revoked,

and the powers of the executor must cease, where a contest is initiated in time, and the will found invalid, it must be set aside in toto, and not left standing as to persons not joining in the contest.¹

Will—Contest After Probate—Mental Capacity.—On the contest of a will on the ground of mental incapacity, the will having been previously admitted to probate, contestants only have the burden of proving the issues raised, and an instruction that the probate of the will raises a presumption of mental capacity, which contestants must also overcome, is properly refused, as imposing an additional burden.²

Will—Contest on Ground of Mental Incapacity.—On the contest of a will on the ground of mental incapacity, declarations of testator are admissible to explain his peculiar actions only when made at about the time of such actions, and therefore a letter by him is not admissible to explain certain conduct, where it is without date, and there is nothing to show when it was written.³

Insanity.—The Discharge of a Person from an Insane Asylum by the resident physician and secretary, though the certificate does not state that she is restored to reason, is prima facie evidence, that she is so restored, or that she was improperly committed, and is therefore a competent witness, these being the only grounds for her discharge under the statute.

Witness—Person Committed to Insane Asylum.—Under Code of Civil Procedure, section 1880, declaring that persons "who are of unsound mind at the time of their production for examination" cannot be witnesses, the fact that a person has been committed to an asylum as insane does not render her an incompetent witness, but the question of competency is for the court, and her testimony is properly received, in the absence of anything to show her of unsound mind.

Witness—Impeachment—Particular Wrongful Acts.—A witness cannot on cross-examination, for the purpose of impeaching him, be asked as to his having been in jail, etc., as, under Code of Civil Pro-

¹ Cited in Estate of Renton, 3 Cal. Pro. Dec. 121, as holding the order, judgment and decree admitting a will to probate not to be final in any sense, and not admissible even as evidence on a trial of a contest of such instrument.

² Cited in Estate of Kendrick, 130 Cal. 370, 62 Pac. 610, in defining an insane delusion.

Cited and followed in State v. Simes, 12 Idaho, 314, 85 Pac. 915, the court saying: "We think, as was said in Clements v. McGinn, 33 Pac. 923, that, 'An insane person is competent to be a witness if he understands the nature of an oath and has sufficient mental power to give a correct account of what he has seen or heard.'"

³ Cited in the note in 4 Cal. Pro. Dec. 521, on declarations of a testator to sustain, defeat, or aid in construction of will.

cedure, section 2051, he cannot be questioned as to particular wrongful acts.

Will Contest—Finding of "Sound Mind."—On the contest of a will, a special finding that testator was not of "sound mind" is a finding of an ultimate fact, and not a mere conclusion of law.

APPEAL from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceeding by Mary A. Clements and another against Eugene McGinn and others to contest the will of James McGinn, deceased, which had been admitted to probate. There was a judgment for contestants and proponents appeal. Affirmed.

P. Reddy, W. H. Metson, Smith & Muraskey and Reddy, Campbell & Metson for appellants; James L. Crittenden and H. S. Foote for respondents.

PER CURIAM.—This is a contest over the last will of James McGinn, who departed this life on or about February 6, 1888, at the city and county of San Francisco, leaving a last will, bearing date September 26, 1887, by which he left to his executors, in trust for his wife, Johanna McGinn, during her life, all of his property, real and personal, of the value of \$60,000 or more, and, upon the death of his said wife, the same was bequeathed and devised to his children by said wife, to the exclusion of certain other of his children by a former wife. The will was admitted to probate, and Eugene McGinn and Joseph Byrne, therein named as executors, were duly appointed as such executors. In due time, Mary A. Clements and Emma Burns, two of testator's daughters by a former marriage, initiated a contest to annul and revoke the probate of said will, and to obtain a decree adjudging the invalidity thereof upon various grounds, among which were: (1) that the will was made under duress; (2) undue influence and duress; (3) fraud on the part of Johanna McGinn and others, whereby the execution of said will was procured; (4) that James McGinn was of unsound mind and insane, and not of sound and disposing mind and memory, when said last will was made, signed, published and executed. Answers were filed by the executors, by Johanna McGinn, the widow, and Ellen Frances McGinn, her daughter, which answers were,

by stipulation of the attorneys, treated as the answers of all the minor children of James and Johanna McGinn. Under the pleadings, seventeen issues were framed and submitted to a jury impaneled to try the cause, all of which were answered by said jury in favor of the respondents below and appellants here, except one, which was answered in favor of contestants. It was as follows: "Eleventh issue. Was the said James McGinn of sound mind at the time said instrument was subscribed by him, and when the said James F. Tevlin and said James F. Smith signed their names to the same?" To which the jury answered "No." The issues as submitted, with the answers thereto, are too lengthy to be set out in full here. It may be said of them in brief that the findings of the jury thereon were complete and specific, and were to the effect that no fraud, duress, menace or undue influence was practiced upon the testator by Johanna McGinn or any other person in the matter of the will; that it was duly made, executed, witnessed, published and declared to be the last will and testament of said James McGinn, and was never by him annulled or revoked, and was only invalid by reason of said testator not being of sound mind at the date of its execution, viz., September 26, 1887. Upon the verdict of the jury, the court entered a decree adjudging that the said James McGinn was not of sound and disposing mind on the twenty-sixth day of September, 1887, at the time when said alleged will was signed and published, and that said alleged will is not the last will and testament of James McGinn, deceased, and revoking the probate of the same. This appeal is prosecuted from the judgment, and from an order denying a new trial. The trial of the cause was on for sixty-seven days, extending from November 15, 1888, to April 20, 1889. The transcript consists of three hundred and forty-two printed pages, of which over one hundred and fifty pages are devoted to the evidence and objections thereto. The instructions of the court to the jury cover some sixty pages. Many exceptions were reserved at the trial. A careful review of the whole case leads to the conclusion that a few only of them need be mentioned.

The testimony tended to show that the testator, James McGinn, was a long time a resident of the city and county of San Francisco, where he was engaged in the business of an

undertaker. He was twice married. By his first wife he had six children, who survived him, four of whom were boys and two girls. By his second wife, Johanna McGinn, who still survives, he had five children, who survived him. Testator seems to have been naturally of an excitable temperament and irascible disposition. For some time prior to August 3, 1887, he was in failing health, and complained of severe pains in his head, and on the last-named date had a sudden and serious attack of paralysis, from the effects of which he was helpless and speechless for a considerable time, and from which he never entirely recovered. The will in question was executed September 26, 1887, and the testator died on or about February 6, 1888, as before stated. The question as to whether or not testator was of sound and disposing mind at the date of the execution of the said will involved the prominent proposition in the litigation. Many witnesses were called to the point by the contestants, the most of whom, as intimate acquaintances of testator, concurred in the opinion that he was mentally insane.

The first contention of the appellants is that the eleventh finding of the jury is not a question of fact, but a conclusion of law. The term "sound mind," as applied to the condition or status of testator, was a fact. It was for the purposes of the case an ultimate fact, in the establishment of which the physical condition of the party, his acts and conduct, were the probative facts. According to the finding of the jury, testator was not of sound mind at the date of the execution of the will; in other words, he was of unsound mind. "A person of unsound mind is an adult who, from infirmity of mind, is incapable of managing himself or his affairs. The term, therefore, includes insane persons, idiots, and imbeciles": Black's Law Dictionary; *Jenkins v. Jenkins' Heirs*, 2 Dana, 103. It is the possession of a sound mind which is one of the requisites to capacity to make a will: Civ. Code, sec. 1270. The term "disposing capacity or mind" is an alternative or synonymous phrase in the law of wills for "sound mind" and "testamentary capacity": Black's Law Dictionary. The expression "unsound mind" equally stands for and includes the want of a disposing mind or testamentary capacity.

It is also contended that the decree or judgment should not have been to set aside or vacate the probate of the will, as to those who did not contest, and *Samson v. Samson*, 64 Cal. 327, 30 Pac. 979, is cited in support of the position. Counsel also suggests a conflict between this case and that of *Estate of Freud*, 73 Cal. 555, 15 Pac. 135. We think a reference to the code will show, first, that the contention of appellants is not tenable; second, that there is no conflict between the cases above mentioned. Section 1330 of the Code of Civil Procedure provides that where, as in the present case, a will is admitted to probate without contest, any person interested may within one year initiate a contest, and if, upon a hearing, it shall appear that the will is invalid or not sufficiently proven to be the last will of the testator, the probate must be annulled and revoked; and the next section provides that thereupon the powers of the executor, etc., must cease. The case of *Freud* was, like the present one, within these provisions, and hence there was properly a revocation of the probate in toto. The case of *Samson v. Samson*, supra, came within the purview of section 1333, which provides that, if no person contests the validity of the will within one year after its probate, such probate shall be conclusive except against infants, etc., who within one year after their disability is removed may contest. Ten years had elapsed in that case between the probate of the will and the contest by an infant, whose disability had been removed within one year next before filing the contest, and it was held that the other heirs were concluded by the lapse of time, and hence that, as to them, the probate should not be set aside.

At the trial, one W. J. Mallady was called as a witness on behalf of contestants, and testified as follows: "I knew James McGinn twenty years. Was in his employ about eight years. James McGinn was always very friendly with me. I enjoyed his confidence and friendship up to the time of his last sickness. On one occasion, when he met me on Montgomery street during his last sickness, he was not cordial or friendly with me as he used to be. He treated me coldly. My opinion is that James McGinn was of unsound mind during his last illness. One of my reasons for this opinion is that he treated me coldly and unfriendly on this occasion when he met me on Montgomery street." Upon cross-examination, counsel for

defendants, after proving by witness that he knew the handwriting of testator, showed him a paper, and asked him if it was in the handwriting of James McGinn. The paper was objected to as evidence, on the ground that it was incompetent, irrelevant and immaterial, and that its identification is irrelevant and immaterial. The objection was sustained and the ruling excepted to. The paper is set out in the record, and is without date. It purports to be a letter signed by James McGinn, addressed to the captain of Boston police, asking for information of one James Mallady, formerly of Boston, and now known as William J. Mallady, and residing in San Francisco; expresses doubts as to his honesty; and seeks information as to his previous career, etc. The object, as we may well suppose, was to show a lack of confidence in and friendship for the witness on the part of McGinn, and thus to account for the treatment of the former by the latter when they met on Montgomery street, as stated in the direct examination. Wherever the bodily or mental feelings of an individual are material as proof upon an issue, the usual expression of such feelings made at the time in question is said to be not hearsay, but original evidence, and, as such, admissible: 1 Greenleaf on Evidence, sec. 102. The difficulty which meets us in the solution of the question here is that there is no date to the document offered in evidence, and no means by which to determine the time when the expressions in it were used. The witness had known McGinn twenty-one years, and had been in his employ about eight years, but during which eight years of the twenty-one does not appear. For aught that is shown, the letter may have been written at almost any time within this extended period. The authorities are quite uniform to the effect that expressions indicative of mental or bodily feeling must be confined to the period of the happening of the event which they illustrate. If, in the present instance, the instrument was intended to show a revulsion of feeling toward the witness on the part of a sane man for valid cause, we are of opinion it should have appeared that it emanated prior to the alleged attack upon which his unsoundness of mind was predicated, or at least prior to the alleged meeting on Montgomery street. If made subsequently, it may have been promoted by the vagary of a disordered mind, and could not be received as rational

support and reason for the changed conduct of McGinn toward the witness. We cannot therefore say there was error in the exclusion of the instrument.

There was no error in the ruling of the court excluding the evidence as to the reasons which induced the witness James McGinn to visit his father. The particular visit is not specified. He had testified as to the condition in which he found his father, and it might well be that he visited him upon the most weighty matter of business, supposing him sane, only to find him in the condition he described. A witness cannot, on cross-examination, for the purpose of impeaching him, be questioned as to particular wrongful acts: Code Civ. Proc., sec. 2051; *Jones v. Duchow*, 87 Cal. 109, 23 Pac. 371, and 25 Pac. 256; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Evans v. De Lay*, 81 Cal. 103, 22 Pac. 408. It follows that the questions propounded to the witness Thomas McGinn as to his having been in the county jail, etc., were improper: *People v. Carolan*, 71 Cal. 195, 12 Pac. 52.

Mrs. Johanna McGinn was called as a witness on the part of contestants, and her testimony was objected to, upon the ground that she was incompetent to testify by reason of having been found to be of unsound mind, and an exception was taken to the ruling of the court permitting her to testify. The evidence already before the court showed that Johanna McGinn, on the thirteenth day of December, 1882, was by order of the superior court, or a judge thereof, committed to the asylum for the insane at Napa as an insane person, upon a certificate showing her to be afflicted with a form of insanity known as "recurrent mania"; also a certificate dated November 4, 1883, signed by the resident physician and secretary, discharging Johanna McGinn from the Napa State Asylum for the Insane, but which did not state affirmatively that she was "cured and restored to reason." The provisions of the Code of Civil Procedure, sections 1763-1766, both inclusive, relate to the appointment and discharge of guardians, and the care and custody of the property of insane and incompetent persons, and, for the purposes specified therein, are of controlling force and effect; and the adjudication of incompetency there provided for is conclusive against all persons dealing with the ward until he is restored to competency to manage his affairs, as provided by section 1766 of the

same code, except as limited by section 40 of the Civil Code. Kellogg v. Cochran, 87 Cal. 192, 12 L. R. A. 104, 25 Pac. 677, discusses the provisions of the code and the cases to which their several provisions are applicable, and we need not repeat the reasoning there indulged in here. The conclusion reached in that case is that a discharge from the asylum, either because improperly committed or upon the ground that the insane inmate has recovered, as provided in section 2197 of the Political Code, restores the person to capacity to sue, save where a guardian has been appointed under the Code of Civil Procedure. The question of the capacity of a witness to testify, however, does not turn upon the point whether or not he has been declared insane, or, when so declared, upon the question of judicial restoration. Section 1880 of the Code of Civil Procedure provides as follows: "The following persons cannot be witnesses: (1) Those who are of unsound mind at the time of their production for examination." This is substantially the rule as it has existed for generations, and was the rule of the common law. The unsound mind mentioned is unsound in fact, in contradistinction to those who have been judicially declared of unsound mind. An insane person is competent to be a witness if he understands the nature of an oath, and has sufficient mental power to give a correct account of what he has seen or heard: District of Columbia v. Arms, 107 U. S. 519, 27 L. Ed. 618, 2 Sup. Ct. Rep. 840; People v. New York Hospital, 3 Abb. N. C. (N. Y.) 243; Buswell on Insanity, sec. 344, and cases cited. The question whether a person who is offered as a witness is insane at the time goes to the competency of the witness, and is a preliminary question to be decided by the court: Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164; Holcomb v. Holcomb, 28 Conn. 177; Grant v. Thompson, 4 Conn. 203, 10 Am. Dec. 119; Coleman v. Commonwealth, 25 Gratt. (Va.) 865, 18 Am. Rep. 711. Section 2197 of the Political Code provides that "insane persons received in the asylum must, upon recovery, be discharged therefrom." The only other ground for a discharge is that provided by the act of March 9, 1885, by which it is made the duty of the resident physician to discharge persons who have been improperly committed: Stats. 1885, p. 35. As was held in Kellogg v. Cochran, supra, a discharge for either of these causes (where no guardian

has been appointed) restores the person to civil capacity. In *Hand v. Burrows*, 23 Hun (N. Y.), 330, it was held that a commission might be issued to take the testimony of one committed to a lunatic asylum in another state, on the ground of insanity, and that the presiding judge would, before admitting it in evidence, determine by the answers given and such witnesses as might be produced as to the mental condition of the witness, and consequent admissibility of the evidence. We are of opinion, then, first, that the discharge of the witness from the asylum was *prima facie* evidence that she was restored to reason, and was of sound mind, or that she was improperly committed to such asylum; second, that in any event the question of her incompetency to testify was one for the court below to determine, and, nothing appearing either from a preliminary examination or from the tenor of her testimony to indicate unsoundness of mind at the date of her examination, no error was committed.

There are numerous other exceptions in the record based upon the rulings of the court upon questions asked by appellants on cross-examination of witnesses, some of which rulings were correct, some clearly upon matters within the discretion of the court, and others which, although of doubtful propriety, are not of sufficient importance to warrant a reversal. We do not feel called upon to notice them in detail. The instructions were voluminous, and presented to the jury, the questions of law applicable to the case with great clearness. A number of those asked by respondents and refused were evidently so refused because others precisely similar or of substantially similar import had been given. Others refused or modified related to issues decided in favor of respondents, and hence need not be considered. The court eliminated from the eighth instruction asked by appellants so much thereof as instructed the jury that the previous probate of the will raised a presumption that McGinn was, at the time of its execution, of sound and disposing mind, and competent to make a will, "and, unless the contestants have overcome not only this presumption, but all of the other evidence in the case offered in support of said presumption and the sanity of the said testator, by a preponderance of evidence and to your satisfaction, you will find in accordance with said presumption," etc. The action of the court was proper. It had already

instructed the jury very properly that "the burden is upon the contestants in this proceeding to prove and establish the issues made herein by a preponderance of evidence, and, unless so established, you will find each and every issue against said contestants." The contestants had the affirmative upon all the issues made, and therefore the burden of proof was upon them: *Estate of Dalrymple*, 67 Cal. 444, 7 Pac. 906; *In re Burrell*, 77 Cal. 479, 19 Pac. 880. That portion of the instruction stricken out, however, assumed, in addition to and beyond all this, the probate of the will cast an additional burden of proof upon the contestants, which was not true. Had they appeared at the probate of the will, and made the same issues, they would have had the same burden cast upon them—no greater, no less. The other objections to instructions are less important, and require no special mention. Those given on behalf of contestants were proper. Upon the whole, the instructions were quite as favorable to respondents (appellants here) as the law permits, and the judgment and order appealed from are affirmed.

HIMMELEIN v. SUPREME COUNCIL AMERICAN LEGION OF HONOR.

No. 14,951; August 30, 1893.

33 Pac. 1130.

Mutual Benefit Insurance—Action on Certificate.—An application for membership in a benefit society, and statements of the applicant to the medical examiner, both of which are on file in the office of the secretary of the society, and are referred to in the benefit certificate, and made part of the contract, need not be set out in the complaint in an action on the certificate. *Cowan v. Insurance Co.*, 78 Cal. 181, 20 Pac. 408, followed.

Mutual Benefit Insurance—Action on Certificate.—In an action on a benefit certificate, by which defendant promised "to pay out of its benefit fund to [plaintiff] a sum not exceeding \$500," the complaint after setting out the certificate alleged that "by the terms and conditions of the said contract the said defendant promised to pay to the plaintiff, out of its benefit fund, the sum of \$5,000"; that the mem-

ber had performed all the conditions of the contract; "and that said sum of \$5,000 is now due and owing from the said defendant to this plaintiff." Held, that the complaint sufficiently stated a cause of action for \$5,000.

Mutual Benefit Insurance.—A Provision in a Benefit Certificate, that it shall be payable only on its surrender, is waived where the benefit society refuses to pay solely on the grounds of nonpayment of assessments, and that another beneficiary had been substituted.

Mutual Benefit Insurance.—In an Action on a Benefit Certificate, by the terms of which the claim was not due until proof of death was furnished, interest will be allowed only from the commencement of the action, where the complaint merely states that proof of death had been made, without showing when, and the findings only show that the proof was made "before the commencement of this action."

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by Sarah A. Himmelein against the Supreme Council American Legion of Honor. There was a judgment in favor of plaintiff and defendant appeals. Modified.

Walter D. Mansfield for appellant; Davis Louderback for respondent.

PER CURIAM.—The defendant is an association incorporated under the laws of the commonwealth of Massachusetts for several purposes, one of which is: "5th. To establish a benefit fund from which, on the satisfactory evidence of the death of a beneficial member of the order who has complied with all its lawful requirements, a sum not exceeding five thousand dollars shall be paid to the family, orphans, or dependents, as the member may direct." It has power to institute subordinate councils and grand councils in other states and countries, and in 1879 did institute at the city of San Francisco, in the state of California, a subordinate council called "Golden Council, No. 118," of which Eugene Alphonso Millard became a member of the sixth degree on the first day of May, 1881; and thereafter, June 2, 1881, the said supreme council issued and delivered to Millard the following "benefit certificate" or policy of life insurance:

“No. 24,311.

“\$5,000.

“AMERICAN LEGION OF HONOR BENEFIT
CERTIFICATE.

“This certificate is issued to companion Eugene Alphonso Millard, a member of Golden Council, No. 118, A. L. H., located at San Francisco, Cal., upon evidence received from said council that said companion is a sixth degree contributor to the benefit fund of this order, and upon condition that the statements made by said companion in application for membership in said council, and the statements certified by said companion to medical examiner, both of which are filed in the supreme secretary's office, be made a part of this contract, and upon condition that the said companion complies in the future with the laws, rules, and regulations now governing the said council and fund, or that may be hereafter enacted by the supreme council to govern said council and fund. These conditions being complied with, the supreme council of the A. L. H. hereby promises and binds itself to pay out of its benefit fund to Sarah Alexandrina Millard, wife, a sum not exceeding five thousand dollars, in accordance with, and under the provisions of, the laws governing said fund, upon satisfactory evidence of the death of said companion and upon the surrender of this certificate: provided, that said companion is in good standing in this order at the time of death: and provided, also, that this certificate shall not have been surrendered by said companion, and another certificate issued, in accordance with the laws of this order.”

From 1874 until the death of Eugene A. Millard, Sarah Alexandrina Millard, who is named as beneficiary in said certificate, was his lawful wife, but after his death she married John Himmelein, and, by the name Sarah Alexandrina Himmelein, commenced this action on said certificate on July 30, 1885, to recover from defendant \$5,000 and interest thereon; and the judgment of the court, without the intervention of a jury, was rendered in her favor on May 18, 1891, for the sum of \$5,000, and interest thereon from the death of Millard (February 23, 1884), the judgment for principal and

interest amounting to \$7,535.53. The defendant appeals from the judgment and from an order denying a new trial.

1. It is contended for appellant that the complaint does not state sufficient facts to constitute a cause of action:

First. Because the statements in Millard's application for membership, and his statements to the medical examiner, both on file in the office of the supreme secretary, and both referred to in the policy, and made parts of the contract, are not set out in the complaint. A sufficient answer to this point may be found in the opinion of this court in the case of *Cowan v. Insurance Co.*, 78 Cal. 181, 20 Pac. 408.

Second. It is claimed the complaint does not state a cause of action, because it appears on the face of the policy set out in the complaint that it is not a contract to pay \$5,000 absolutely, but only to pay a sum not exceeding \$5,000, and that no facts are alleged by which the court can estimate and determine what sum the plaintiff is entitled to. There was no demurrer to the complaint, and therefore appellant is not entitled to complain on the ground of mere uncertainty or ambiguity. The policy set out in the complaint states that the defendant "promises and binds itself to pay out of its benefit fund to [plaintiff] a sum not exceeding five thousand dollars, in accordance with, and under the provisions of, the laws governing said fund." After setting out the policy, the complaint states "that by the terms and conditions of the said contract, the said defendant promised to pay to the plaintiff, out of its said benefit fund, the sum of five thousand dollars"; then alleges that Millard performed all the conditions of said policy to be performed by him; that the defendant has, and always has had, in its benefit fund, sufficient money to pay \$5,000, and the interest thereon; "and that said sum of five thousand dollars is now due and owing from the said defendant to this plaintiff." These allegations are to the effect, and must have been understood by a person of ordinary understanding to mean, that by the performance of all the conditions precedent on the part of Millard, and by virtue of, and "in accordance with, . . . the provisions of the laws governing said fund," the conditional promise of the defendant had matured into an absolute obligation to pay the full sum of \$5,000, with interest thereon. Yet it is contended that the "provisions of the laws governing said fund,"

referred to in the policy, should have been stated or set out in the complaint, and that otherwise the sum due on the policy could not have been estimated or determined from the complaint. Conceding the complaint to have been defective in this respect, the defect was waived, and rendered harmless, if not entirely cured, by a stipulation between the attorneys of the respective parties, made and filed before the defendant answered the complaint, by which it was agreed that two printed pamphlets then on file in the case contained all the laws of defendant applicable to or bearing upon this case, or referred to in the policy, and that such laws were to be "introduced, admitted, and read in evidence." This stipulation is expressly referred to in the answer of defendant, and in pursuance thereof the answer refers to said pamphlets as then being on file in this action, and containing the laws and constitutions of the defendant, as though they were exhibits annexed to the answer. The object and substantial effect of the stipulation was to make it a part of the pleadings by which all the laws of the defendant, applicable to the case, became conclusively admitted facts. Both parties acted upon, and had the benefit of, the stipulation. Each party read from the pamphlets such portions of the laws as deemed favorable to its theory of the case, without objection, and the stipulation and the contents of the pamphlets are made parts of the statement on motion for new trial. If the stipulation had not been made, and defendant had demurred to the complaint, or had objected to evidence of the laws on the ground that they had not been pleaded, the plaintiff might have been permitted to amend her complaint so as to make it unobjectionable. The laws of the defendant, admitted by the stipulation, together with the facts properly alleged in the complaint, and found by the court to be true, warrant the legal conclusion that the policy obligated the defendant to pay the plaintiff the full principal sum of \$5,000; and in view of the stipulation, and the action of the parties thereunder, in which appear all the elements of an estoppel in pais, the defendant cannot be heard on this appeal, for the first time, to object to the complaint on the ground that those laws were not therein set out: *Donner v. Palmer*, 51 Cal. 630.

Third. The third objection to the complaint is substantially the same as the second, and admits of the same answer.

Fourth. Inasmuch as the policy is made payable "upon the surrender of this certificate," it is contended that the complaint is defective, in that it does not aver a surrender of the certificate. It is alleged in the complaint that satisfactory evidence of the death of Millard was furnished to defendant, but that defendant refused, and still refuses, to pay to plaintiff said sum of \$5,000, or any part thereof. The answer not only admits (by not denying) the alleged refusal to pay, but denies defendant's liability to pay any sum on other grounds than the failure of plaintiff to surrender the certificate, namely, nonpayment of assessments, and that another beneficiary had been submitted for the plaintiff, without alleging as a defense, or at all, a failure or refusal to surrender the certificate. Conceding, for the sake of the argument, merely, that the surrender of the policy is a condition precedent to the right to recover, yet like the condition in a policy of fire insurance requiring proof of loss, etc., it may be waived by the insurer's denial of all liability on other grounds. In Bacon on Benefit Societies and Life Insurance (section 413), the author says: "No proofs of loss are necessary if the company disclaims all liability under the contract. Probably no rule of insurance is better settled than this. . . . And so, when the insurer declines to pay the loss, and assigns a reason other than want of proofs, as, for example, the nonpayment of an assessment, then proofs of loss are excused. This rule, also, has never been denied. Many other acts and circumstances will be construed to amount to a waiver of proofs of loss, or of any defects which might, under other conditions, be taken advantage of": See, also, *Schwarzbach v. Protective Union*, 25 W. Va. 648, 52 Am. Rep. 227. And thus the defendant in this case waived a surrender of the certificate, since it must be presumed that its agents had knowledge of the failure to surrender the certificate, if such was the fact, at the time they denied all liability of defendant on other grounds.

2. It is contended for appellant that the court erred in allowing interest on the principal sum found due on the policy from the date of Millard's death, or any interest whatever, for the reason that before adjudication the sum which plaintiff was entitled to recover was uncertain and unliquidated; and, furthermore, that it does not appear when defendant was

furnished with proof of Millard's death. It is true that, while it is alleged that proof of Millard's death had been made, the complaint does not show when it had been made, and the findings show only that it was furnished to defendant "before the commencement of this action." It was therefore error to allow interest for any time before the commencement of the action, since by the terms of the policy the demand was not due until such proof was furnished. Millard died February 23, 1884, and this action was commenced July 30, 1885. Therefore, interest should have been allowed only from and after this last-mentioned date: *Chase v. Insurance Co.*, 67 Me. 85-91; *Trager v. Insurance Co.*, 31 La. Ann. 235, 442. It is not true, however, that the sum to which plaintiff was entitled was unliquidated or uncertain at the time the action was commenced. On the complaint and stipulated facts the plaintiff was entitled to recover on the contract (policy) the certain principal sum of \$5,000, and interest thereon from and after the maturity of defendant's obligation to pay the same. The court found all the facts stated in the complaint to be true, and the defendant is estopped from denying the stipulated facts as to the laws and constitution of the defendant: *Donner v. Palmer*, 51 Cal. 630. By the terms of the policy, and according to defendant's answer, the defendant was to pay "out of its benefit fund . . . a sum not exceeding five thousand dollars, in accordance with, and under the provisions of, the laws governing said fund." According to those laws, the plaintiff, on the facts alleged in the complaint, was entitled to recover the certain sum of \$5,000. No assessment was necessary, since it is admitted by the pleadings that there was sufficient money in the benefit fund to pay the sum demanded. Nor was any assessment authorized, unless the benefit fund required it. Appellant's objections to interest, after the demand became due, ultimately rest on the alleged insufficiency of the complaint, in that it did not set out the laws, entirely ignoring the stipulation as to those laws. The reading of the laws governing the benefit fund as a part of the contract, in connection with the facts alleged in the complaint and found by the court, removes all uncertainty as to what sum the plaintiff was entitled to recover at the date of the commencement of the action, and furnishes an answer to all objections to the allowance of in-

terest from and after that date: Civ. Code, sec. 3287. This conclusion is not in conflict with the decision of this court in the case of Deardorff v. Association, 89 Cal. 600, 27 Pac. 158, as will become obvious on comparison of the facts of this case with those of that.

3. It is contended that the finding that Millard was a member in good standing immediately before he died and the finding that no other person had been substituted for plaintiff as beneficiary are not justified by the evidence. There is but little real conflict of evidence upon either of these issues, and the evidence tending to sustain the findings on both seems amply sufficient.

4. The contention of appellant that, although no substitution of beneficiary was actually made, yet it should have been made, and therefore, upon equitable principles, should be considered as having been made, has no foundation either in defendant's answer or in the evidence. It does not appear that the substitution claimed would have been equitable, but the contrary.

5. The contention that plaintiff was estopped from claiming the benefit of the policy by her acquiescence in the proceedings in an action by Nellie C. Millard upon the same policy (81 Cal. 340, 22 Pac. 864) is without merit. That action is not mentioned or referred to in the pleadings. This plaintiff was not a party to it. No record of it was introduced in evidence, and there was no evidence that plaintiff acquiesced in it or in any proceeding therein. The cause is remanded, with direction to the court below to modify the judgment by deducting therefrom the interest thereby allowed for any time prior to the commencement of the action. As so modified, the judgment and order are affirmed; costs of appeal to be taxed to respondent.

In re IRVINE'S ESTATE.*

No. 14,988; August 30, 1893.

33 Pac. 1128.

Appeal.—A Verdict Rendered on Conflicting Evidence will not be disturbed on appeal, though the preponderance is apparently in favor of appellant.

APPEAL from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceeding by Endora V. Smith to recover a claim against the estate of William Irvine, deceased. There was a judgment in favor of petitioner, and the administrator appeals. Affirmed.

J. M. Seawell and J. B. Reinstein for appellant; H. N. Clement and G. W. Haight for respondent.

GAROUTTE, J.—This is an appeal by the administrator of the estate of William Irvine, deceased, from a decree requiring him to pay to Endora V. Smith the sum of \$500. Petitioner, having a claim against the estate of said deceased, alleges that by reason of certain false representations made to her by the administrator and his attorney, and upon which representations she relied, she compromised her claim against said estate for \$500 less than the amount that was legally due her, and this proceeding was brought against the administrator to recover that sum. The main contention of appellant's counsel is that the evidence does not support the findings. After a careful examination of the record, we cannot say but that a substantial conflict in the evidence arises upon all material matters. While the preponderance is apparently favorable to appellant, yet the only safe rule, and therefore the only wise rule, for this court to follow, where a substantial conflict does arise, is to affirm the action of the trial court. This principle is settled law. The findings are sufficient to support the decree. Let the judgment and order be affirmed.

We concur: De Haven, J.; McFarland, J.; Fitzgerald, J.

*For subsequent opinion in bank, see 102 Cal. 606, 36 Pac. 1013.

GRUNWALD et al. v. FREESE.

No. 15,069; August 31, 1893.

34 Pac. 73.

Evidence—Quality of Rope or Wire—Opinion.—Testimony as to the quality of old wire rope sold by sample, that the outer wires were broken into short pieces; that the rope was “rotten, and a little broken, instead of being as the sample”; that much of it was “broken, rusty and rotten”—relates to facts open to common observation and not requiring expert knowledge.

Evidence—Market Value of Goods.—Merchants and Clerks of merchants in a foreign country who deal in a certain article are competent to testify as to the market value of the article in such foreign country.

Release of Action—Necessity of Pleading.—A Release of a Cause of action is not available unless it is specially pleaded.¹

Payment.—A Debt Contracted in a Foreign Country is payable in the currency of that country, and therefore, where the creditor sues in the United States, he is entitled to recover such sum in money of the United States as equals the debt in the foreign country when it was payable.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Fritz Grunwald and Otto Munch, partners under the firm name of H. C. Morf & Co. against William Freese. There was a judgment in favor of plaintiffs and defendant appeals. Affirmed.

Page & Eells for appellant; Young & Powers and James Herrmann for respondents.

SEARLS, C.—This appeal is prosecuted by the defendant from a final judgment in favor of plaintiffs and comes up on a bill of exceptions. The action was brought by plaintiffs,

¹ Cited with approval in *Holt Mfg. Co. v. Odenrider*, 61 Wash. 557, 112 Pac. 671, where the defendant had contracted in writing to purchase a harvester, to be shipped to him, and by the writing expressly agreed “not to countermand this order except for failure of crops prior to the date of shipment.”

factors and commission merchants at Yokohama and Hiogo, in the empire of Japan, to recover from the defendant, a merchant, in the city and county of San Francisco, \$4,999.60 Mexican dollars, of the value of \$4,149.67 gold coin of the United States, a balance due on a mutual, open, and current account, with interest, etc. For some time prior to 1888 defendant had shipped from San Francisco to plaintiffs in Japan, for sale by them as his factors in the Japanese market, merchandise of various kinds, and plaintiffs had also shipped Japanese goods to defendant, for sale by him in like manner, and for their account in San Francisco. On July 10, 1888, defendant wrote to plaintiffs that he could buy in San Francisco a large amount of old cable rope after it was laid aside by the cable railroad companies, and sent a sample of the rope, asking plaintiffs to notify him by return mail what they could do with the article in Japan; what quotations they could make per picul (one hundred and thirty-three and one-third pounds) in Mexican dollars, and about how many tons they could dispose of per month. Defendant also inquired if the plaintiffs would authorize him to draw on them, against consignments, for an advance of say \$10 gold per ton of two thousand two hundred and forty pounds, F. O. B. (free on board), San Francisco, ninety days' sight draft, etc. Plaintiffs responded by letter under date of August 16, 1888, saying: "The article in condition like sample is very salable here, only the thickness is not suitable. People here want 13, W. G. No. 8-13 (Birmingham wire gauge), whereas your samples, according to B. W. G., measure only 16. People here do not wish wire which is thicker than No. 8 or thinner than No. 13," but that between those numbers it was desirable, and a considerable business could be done in it. Plaintiffs inclosed in a letter samples of No. 8 and No. 13 wire. They also added that, subject to defendant's approval, they had contracted for fifty tons according to his sample, but only of sizes 8 to 13, at the gross sale price of \$2.50 per picul. Plaintiffs consented that defendant should draw upon them for seventy-five per cent advances of the probable net proceeds, freight and insurance paid there (San Francisco). They further stated that, "in the event the first shipment turns out satisfactory to our customers, we will easily be able to sell twenty tons per month." Defendant denied that he owed plaintiffs anything upon the

account, and by way of counterclaim sets out that he was induced by the representations of the plaintiffs to purchase and ship to them large quantities of wire cable; that he was misled by them; that they failed to notify him promptly that the cable could not be sold; and in apt terms stated facts which, if true, constituted a defense to the action. It seems that the wire rope was sent to Japan, not to be used in its then condition for mechanical purposes, but to be dissevered, and the wires contained therein to be worked into nails for tea chests, frames for umbrellas, etc. For these purposes the sizes of the wires were required to be from No. 8 to No. 13, inclusive. The two wires sent by letter to the defendant, before mentioned, were samples as to size, and not as to quality, being Nos. 8 and 13, respectively.

In rebuttal of the case made by defendant in support of his counterclaim, plaintiffs read in evidence the depositions of Ernest Decker, Theodore Bunge, Henry Lucas, Johann F. Crosser and Fritz Grunwald, taken upon interrogatories in Japan. These witnesses all testified to a greater or less extent in regard to the condition or appearance of the wire rope forwarded by the defendant, its relative condition with the sample forwarded by defendant to the plaintiffs, the market value of goods like the sample, and the market value of the goods actually shipped. Cross-interrogatories were waived by defendant's counsel, and no objections seem to have been made until the reading of the depositions at the trial, when counsel for defendant moved to strike out from each deposition, severally, certain portions thereof, viz., those portions relating to the quality of the wire rope shipped, and its comparative merits as relating to the samples; also that relating to the market price for this class of goods in Japan, upon the ground that it did not appear that the witness knew the market prices, or that he was sufficiently expert to give an intelligent opinion upon any of these matters. The objections to the several depositions were similar in language, and all based upon the same grounds. The witnesses were all either commission merchants in Japan or clerks in the employ of such merchants. The question of value, or market value, is mainly one of fact, but is usually defined as a matter of opinion gathered from facts, and as was said by Story, J., in *Alfonso v. United States*, 2 Story, 421: "We must necessarily resort

to opinions of merchants and others conversant in trade for market prices or values of the goods." Wharton, in his work on Evidence (section 447), lays down the rule as follows: "Two essentials, therefore, exist to a proper estimate of value: First, a knowledge of the intrinsic properties of the thing; second, a knowledge of the state of the markets. As to such intrinsic properties as are occult and out of the range of common observers, experts are required to testify; as to properties which are cognizable by an observer of ordinary business sagacity, being familiar with the thing, such an observer is permitted to testify." So far as the condition of the wire rope was concerned, it was a question to be determined, not from its occult qualities, but from its appearance, and from the effect produced upon it by handling; that its outer wires were broken up into short pieces; that "the goods sent were rotten, and a little broken, instead if being as the sample"; that much of it was "broken, rusty, and rotten," or, as another witness said, "in trying to undo the coils the whole thing broke to pieces, into small pieces from half an inch to two inches long." These were facts to be gleaned from observation, and were stated as such, facts open to every observer, and not requiring expert knowledge, and whether they were experts on the subject or were not is of little importance. The question of the value of the rope in the market was one upon which merchants dealing in the article in question were competent to speak. As before stated, the witnesses were all commission merchants in Japan, or were in the employ of such merchants; and it may be added that it appeared directly or incidentally that all of them who testified as to the value of the commodity were or had been engaged in the sale of the article, or were in the employ of those thus engaged. They all showed themselves to possess more or less knowledge of the efforts made by plaintiffs to dispose of the goods, and had themselves either sold, attempted to sell, or were familiar with the efforts made to sell the goods. Under such circumstances, while the depositions are not as full and satisfactory as could be wished in showing knowledge and experience on the part of some of the witnesses, I do not regard the errors assigned in the rulings upon the depositions as sufficiently established to warrant a reversal.

If, however, we are wrong in the foregoing conclusion, and should hold that the depositions were, so far as objected to, improperly admitted, it is not perceived that the court below would have been justified in reducing the amount of plaintiffs' recovery. The balance of account in favor of plaintiffs was not only proven, but at the trial, in answer to a question by the court, "defendant's counsel announced that there was no contest on the account at all, but as an offset defendant relied on plaintiffs' assurance of disposing of the rope as sent, and that defendant had suffered loss far greater than the amount plaintiffs claimed against defendant by reason of plaintiffs' failure to do what was agreed in the matter, and that defendant asked no affirmative relief, but charged that he was damaged in the sum of \$5,000 in round numbers." The case as made by the defendant failed to establish a counterclaim, and hence the evidence objected to, which tended to show why consigned goods brought no higher price, and were not sooner disposed of, was unnecessary.

There is a further contention that plaintiffs released defendant from the balance due them. On the third day of June, 1889, the plaintiffs, in a letter to defendant, used the following language: "Naturally you know very well that we will never consent to proceed against you legally. Our hope to reduce our loss in this transaction, if possible, to a minimum limits itself, therefore, that after the settlement of your different transactions the loss will be small," etc. Conceding, without deciding, that the quoted clause of plaintiffs' letter amounted to a release, then it should have been specially pleaded: *Moss v. Shear*, 30 Cal. 468; *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Coles v. Soulsby*, 21 Cal. 47. There was no consideration for the promise, and therefore it did not amount to a covenant not to sue: *Upper San Joaquin Canal Co. v. Roach*, 78 Cal. 552, 21 Pac. 304. It is apparent, however, that neither of the parties regarded the letter as amounting to a release. In the following December we find defendant writing to plaintiffs: "I refuse to participate in the loss caused by your fault and recommendations, with more than that already suffered, which amounts to nearly thirty per cent," to which plaintiffs reply: "We hope soon to find the opportunity to dispose of the goods, and after a thorough inspection we shall consult with our Yokohama

house as to what steps we shall take to compel you to the liquidation of this debt."

The account in Japan was kept, as appears, for convenience' sake, in Mexican dollars. Plaintiffs aver that on the seventh day of August, 1890, there was due them \$4,999.60 Mexican dollars, of the value of \$4,149.67 gold coin; that on or about August 26, 1890, they submitted their account to defendant, and demanded payment, and pray judgment for such sum, with interest. It was stipulated that Mexican dollars were at the date of the commencement of the suit worth 83 cents. At the date of the demand (August 23, 1890) they were worth ninety-three and one-half cents, and at the date of trial seventy-four to seventy-five cents. The court gave judgment for the value at the date of suit brought. This was more favorable to defendant than it would have been to have computed the value of the foreign silver at the date of the demand of payment, but not as advantageous to him as a computation at the date of trial. A debt contracted in a foreign country, in the absence of a contrary understanding, is payable there, and in the legal currency of that country. The parties having, by common consent, expressed their account in Mexican dollars, and the debt having been contracted in Japan, it stands on the same footing as though Mexican dollars were the currency of that country. It follows that, the debt not having been paid in Japan, and plaintiffs being compelled to sue here, they were entitled to judgment for such sum in our currency or money as was equivalent to their claim in Japan: *Benners v. Clemens*, 58 Pa. 24; *Cash v. Kennion*, 11 Ves. 315. In the language of the chancellor in the case last cited: "Where a man agrees to pay £100 in London upon the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him the law of that country ought to give him just as much as he would have had if the contract had been performed." Apply the principle thus enunciated to this case, and we may say that, had defendant met his contract when it was due—that is to say, when demand was made upon him—plaintiffs would have had \$4,999.67 Mexican dollars of the value of ninety-three and one-half cents each, or their equivalent in our currency; a sum in excess of that which the court awarded them. If a man contracts to deliver wheat on a given day,

and fails to do so, the measure of damages is the market price of the article on that day; and in principle it is difficult to see why the rule should not hold good when he agrees to deliver Mexican dollars, or other foreign money, which in the absence of some positive law of our own, is but a commodity. There are authorities which hold that the rate of exchange at the date of the trial is the criterion by which to determine the amount of the judgment, but in most instances the only question evidently relates to the mere expense of effecting the exchange, or, in other words, the cost of transmitting the funds, for that is what it amounts to—cases in which, so far as appears, the question of depreciation or appreciation of the currency in which the debt was payable cut no figure. In *Benness v. Clemens*, *supra*, cited by appellant, the recovery was had upon the basis of the value of legal tenders at the date of the presentation of the account. To discuss the question satisfactorily would require more space than can reasonably be accorded to it, and I content myself with saying that my conclusion, drawn from a perusal of the conflicting authorities, prompts the declaration that if any error was committed by the court below it was in favor of the defendant, and hence that he is not in a position to complain. The evidence supports the findings, and the latter covers the issues in the case, and the judgment appealed from should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

MARSHALL v. KEEFE.

No. 15,124; August 31, 1893.

34 Pac. 89.

Sale of Potatoes—Merchantable Quality.—The fact that part of a lot of potatoes contracted for as “merchantable” have “sprouted a little” does not necessarily show that they are unmerchantable, but, there being evidence that the lot in question were salable for table use or shipment, the question whether the purchaser was justified in refusing to receive them is for the jury.

APPEAL from Superior Court, City and County of San Francisco; John F. Finn, Judge.

Action by P. S. Marshall against D. Keefe. From a judgment for plaintiff, defendant appeals. Affirmed.

E. F. Preston for appellant; Wm. H. Chapman for respondent.

PER CURIAM.—This action was brought by the seller of a lot of potatoes to recover damages from the purchaser, who refused to receive them when tendered. A jury trial was had, plaintiff recovered judgment, and defendant appeals from the judgment, and from an order denying a new trial. The contract called for Early Rose merchantable potatoes. It is claimed that there was no evidence at all tending to show that the goods tendered were merchantable. In this, we think, after carefully examining the record, the appellant is in error. There is much testimony to that effect. Appellant seems to conclude, because plaintiff's witnesses testified that some of the potatoes had sprouted a little, that it would necessarily follow that they were not merchantable. But this proposition cannot be sustained. That might depend upon how badly they had sprouted, and perhaps upon the time of the year in which they were to be delivered. Some witnesses testified that the potatoes tendered were salable for table use, or, as the witnesses preferred to say, for shipment. It became a question for the jury, and was submitted to them under instructions which are not complained of here. The judgment and order are affirmed.

MOORE v. MOORE et al.

No. 14,337; August 31, 1893.

34 Pac. 90.

Ejectment—Specification of Error.—In an action in the nature of ejectment, a specification of error that “the evidence showed that defendant M. was not in possession of said premises, or of any part thereof, at the time of the commencement of this action,” is insufficient.

Ejectment—Possession—Evidence.—In an action in the nature of ejectment, where the evidence tends to prove that defendants were in possession of the premises when the action was commenced, an answer denying plaintiff’s title and right of possession is sufficient evidence of ouster.

Cotenancy—License by One Tenant to Enter.—A tenant in common cannot, as against his cotenant, give a license to a third person to enter on the land held in common.

Instructions.—An Exception Reading, “To Said Oral Instructions, and each and every part thereof, and to the giving thereof by the court, the defendant then and there duly excepted,” is too general.

Ejectment by Widow to Recover Homestead.—In ejectment by a widow against her husband’s administrator for premises which had been set apart by order of court as a homestead to plaintiff and her minor children, absolutely, it appeared that, from the time of defendant’s appointment as administrator till the homestead was set apart, defendant collected the rents of the premises, and paid taxes; that two months thereafter plaintiff demanded possession of him, which, she testified, he refused to give; that in his verified statement to the tax collector he included this homestead property; and that he leased part thereof to another. Held, that the evidence justified a verdict that defendant was in possession when the action was commenced.

Ejectment—Landlord as Party Defendant.—Where a defendant in ejectment is in possession of any part of the premises as tenant of another, it is proper to join the latter as party defendant.

APPEAL from Superior Court, Santa Cruz County; James F. Breen, Judge.

Action by Helen M. Moore against Thomas W. Moore and Leonard T. Almstead. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Spalsbury & Burke, Joseph N. Skirm and Warren Olney for appellants; Charles B. Younger for respondent.

VANCLIEF, C.—Action in the nature of ejectment to recover possession of an undivided half of a parcel of land situate in the county of Santa Cruz, and containing about thirty-five acres, which plaintiff claims as a probate homestead. It is alleged in the complaint that the plaintiff is the owner, and entitled to the possession, of the demanded premises; that defendants are in possession, and wrongfully withhold the possession from the plaintiff; that the rents and profits of the land have been and are of the value of \$480 per year; and that the plaintiff has sustained damages in the sum of \$2,300 by reason of the detention and withholding of the possession. Prayer that plaintiff may recover the land, with rents, profits, and damages. The separate answers of the defendants each “denies that plaintiff is, or ever was, the owner, or entitled to the possession, of an undivided one-half of the real estate described in said complaint, or any part thereof,” and specifically denies every other allegation of the complaint, except that it is admitted that the value of the rents and profits have been one dollar per year. The jury returned a general verdict for the plaintiff, and assessed the damages at \$847, upon which judgment was rendered in favor of the plaintiff. Defendants appeal from the judgment, and from an order denying their motion for a new trial.

The plaintiff is the widow of William H. Moore, deceased, who left surviving him four minor children by a former marriage, and a son by his marriage with plaintiff was born after his death, and named William H. Moore. The defendant Thomas W. Moore is a brother of the deceased, and administered upon his estate. On the petition of the plaintiff, filed after the birth of her son, William H. Moore, the demanded premises were set apart from the separate estate of her deceased husband by the probate court, as a homestead for the use of the widow and three of said minor children, namely, Charles Moore and Stella Moore, children of the former marriage, and William H. Moore, the son of plaintiff. The order setting apart the homestead was made April 26, 1881, and apportions the homestead as follows: “The undivided one-half part thereof to said widow, Helen M. Moore, and the un-

divided one-sixth thereof to each of the said minor children of the deceased, to wit, Charles Moore, Stella Moore, and William H. Moore." The effect of this order was determined in the case, *Estate of Moore*, 96 Cal. 522, 31 Pac. 584, in which it was held that conceding the order to have been erroneous, in that it did not limit the duration of the homestead as required by section 1468 of the Code of Civil Procedure, yet, as there had been no appeal from it within the time limited by law, it was not void, and passed absolute title to the widow and the children named, so that the homestead was not subject to distribution on the settlement of the estate. The defendant Thomas W. Moore was a party to that appeal. It appears that Charles Moore was fourteen years of age at the time the petition for homestead was filed (August 2, 1877), and consequently became of age sometime in 1884. The homestead has upon it a large and a small dwelling-house, a barn and other outhouses, and an orchard, besides a field of about twenty acres.

1. It is contended for appellants that the evidence is insufficient to justify the verdict that defendants were in possession of the demanded premises at the time of the commencement of the action, and also insufficient to justify a verdict for any damage whatever. The only specifications of deficiency of evidence as to the possession of the defendants are the following: "The evidence showed that the defendant Thomas W. Moore was not in possession of said premises, or any part thereof, at the time of the commencement of this action," and a similar specification as to the defendant Almstead. This is not a specification of any particular in which the evidence is insufficient to justify the verdict, nor it is substantially equivalent to such specification. In the absence of the specification required by section 659 of the Code of Civil Procedure, the respondent was not required to bring into the statement all the evidence applicable to the issue as to the possession of defendants, nor can it be presumed that the statement contains all such evidence unless it purports to contain all the evidence in the case, which this statement does not. Yet, while I think respondent's point that the specification is insufficient is well taken, it appears that the evidence contained in the statement is amply sufficient to justify the verdict that defendant Almstead was in possession at the

time the action was commenced. The defendants, in their testimony, admitted that defendant Moore, as administrator, verbally leased to defendant Almstead the land of the estate adjoining the homestead from October 1, 1884, to October 1, 1885, and again from October 1, 1885, to October 1, 1886. It was proved and admitted by Almstead that during those two years he cultivated the twenty-acre field on the homestead, and that his employees occupied the small dwelling and other outhouses; but he and his codefendant, Moore, denied that the latter leased to him any part of the homestead, although two witnesses (Hoff and Bennett) testified that during the years 1885 and 1886, while they were working for him upon the homestead, he told them, severally, at different times, that he had rented the homestead, except the big dwelling-house, from defendant Moore. As to the possession of the defendant Moore at commencement of the action, the evidence is not so clear, yet, I think, tended to prove it. It is not controverted that, from the time of his appointment as administrator (March 4, 1872) until the order setting apart the homestead (April 26, 1881), he had at least constructive possession of all the decedent's real estate, including the homestead, and it appears that he collected the rents and paid the taxes during that period. He contested the application for the homestead, the plaintiff not being in possession at the time the application was made, nor at any time since. A part of the order setting apart the homestead is as follows: "It is hereby further ordered and adjudged that the administrator of said estate of William H. Moore, deceased, deliver the possession of the said homestead above described to Helen M. Moore, the petitioner herein." It is admitted that about two months after the order the plaintiff made both written and oral demand of the administrator for possession of the homestead, and she testified that upon such demand he expressly and emphatically refused. She said: "I asked said Thomas W. Moore if he would deliver me possession of the homestead. He said he would be damned if he would do it." He denied this, saying he only refused to deliver the personal property. In his verified statement to the county assessor of property in his possession in the years 1884 and 1886, subject to taxation, he included the land constituting the homestead. I think the testimony, and circumstantial evidence also, tended to

prove that he leased to the defendant Almstead so much of the homestead as the latter cultivated and occupied. It was not necessary to constructive possession that the administrator should have personally resided upon or cultivated the homestead: *Barstow v. Newman*, 34 Cal. 90. And constructive possession of a defendant in ejectment is sufficient to entitle a plaintiff to recover in that form of action: *Crane v. Ghirardelli*, 45 Cal. 235. And if the defendant Almstead was in possession of any part of the homestead, as a tenant of the administrator, the latter was properly joined as a party defendant: Code Civ. Proc., sec. 379; *Oakland Gaslight Co. v. Dameron*, 67 Cal. 663, 8 Pac. 595. As to the alleged insufficiency of the evidence to justify the verdict for damages, the specification is sufficient, but in that particular the evidence appears to be sufficient. Two witnesses testified that the rental value of the premises was from \$25 to \$30 per month, and one that it was \$35 per month, and the evidence tended to prove that the possession was withheld more than two years.

2. At request of plaintiff's counsel, the court gave ten written instructions to the jury, to each one of which counsel for defendants objected, without stating any ground for the objection, and excepted to the ruling of the court in overruling their objections, the objection and exception to each instruction being as follows: "To the giving of which said instruction to the jury said defendants objected, which objection was overruled by the court, and said instruction was given by the court to the jury, to which ruling of the court the defendants then and there duly excepted." The statement on motion for new trial specifies, as an error in law, the giving of each of the ten instructions, without stating in what the error consists. There is nothing in the record indicating that the ground of objection to any one of the instructions was that it was not applicable to the evidence, nor that the evidence was not sufficient to justify the verdict in respect to the possession of the defendants, yet, upon this ground alone, it is contended for appellants that the ninth of said instructions is erroneous, which is as follows: "Each of the defendants, in his several answer in this action, denies that the plaintiff is or ever was the owner, or entitled to the possession, of an undivided one-half of the real estate described in the complaint, or of any part thereof. Such denial

was an ouster of plaintiff, and did away with occasion for a demand of possession." Assuming that the evidence tended to prove the defendants were in possession of the demanded premises at the time the action was commenced (which I think should be presumed, in the absence of any specification of insufficiency of the evidence to prove it, even though such evidence were not to be found in the record), the answers of the defendants, denying the plaintiff's title and right of possession, afford sufficient evidence of an ouster: *Ketchum v. Barber* (Cal.), 12 Pac. 251 (not officially reported); *Marshall v. Shafter*, 32 Cal. 177; *Payne v. Treadwell*, 16 Cal. 220.

The following is the tenth instruction given at the request of the plaintiff: "If the land described in the complaint is the same land described in the order setting apart the homestead to Helen M. Moore and the minor children of W. H. Moore, deceased, then the right to the possession of the homestead was in said plaintiff and the said children, and none of the children named in said order could give any right to any person to occupy any part of said homestead, as against said plaintiff." This instruction was objected to in the same form as was the ninth, no ground of objection being stated. The ground of objection here stated for the first time is founded upon evidence tending to prove that the defendant Almstead occupied and cultivated the homestead by express license from Charles Moore, who, it is claimed, was a tenant in common with plaintiff in the homestead, to the extent of one-sixth thereof, by virtue of the order setting it apart. It is contended that, inasmuch as Charles Moore was then twenty-one years of age, his bare license or permission to Almstead to enter, occupy, and cultivate the homestead, as he did, conferred upon the latter a right to do so, as against the plaintiff; that such license is a complete defense to this action, so far as Almstead is concerned; and, consequently, that the tenth instruction is erroneous, in that it instructs the jury that "none of the children named in said order [setting apart the homestead] could give any right to any person to occupy any part of said homestead, as against said plaintiff." Conceding that Charles Moore was a tenant in common, as claimed, it is well settled that the instruction is correct. "No action of a portion of several tenants in common can impair the right of their cotenants": *Mahoney v.*

Van Winkle, 21 Cal. 553 (per Field, C. J.): Freeman on Cotenancy, sec. 172, and cases there cited. Other objections are made to some of the ten instructions, given at the request of plaintiff's counsel, for which, however, I find no valid ground in the record.

3. Besides the ten written instructions given at request of the plaintiff, the court gave about an equal number of oral instructions occupying about five pages of the printed transcript. To these defendants excepted in the following language, and not otherwise: "To which said oral instructions, and each and every part thereof, and to the giving thereof by the court, the defendants then and there duly excepted." This was too general (*Sill v. Reese*, 47 Cal. 296-348; *Rider v. Edgar*, 54 Cal. 127; *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318), and for this reason the oral instructions will not be reviewed on appeal. I think the judgment and order should be affirmed.

I concur: Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

DUNLOP et al. v. KENNEDY et al.*

No. 15,112; August 31, 1893.

34 Pac. 92.

Mechanics' Liens.—Failure of the Contract for Erecting a building to comply substantially with Code of Civil Procedure, sections 1183, 1184, relating to mechanics' liens, does not render the contract void. *Lumber Co. v. Wooldredge*, 90 Cal. 578, 27 Pac. 431, followed.

Mechanics' Liens.—A Contract for Erecting a Building, which provides that twenty-five per cent of the sum to be paid shall remain unpaid until thirty-five days after completion of the building, and the remainder be paid in partial payments equal to seventy-five per cent of the value of the work and material done and furnished at the time of such payments, sufficiently complies with Code of Civil Procedure, section 1184, providing that the contract price shall, by the terms of the contract, be made payable in installments at specified

*For subsequent opinion in bank, see 102 Cal. 443, 36 Pac. 765.

times after commencement of the work, and on the completion of the work, provided that at least twenty-five per cent of the whole contract price shall be made payable at least thirty-five days after final completion of the contract.

Mechanics' Liens—Contract for Building.—Under Code of Civil Procedure, section 1184, requiring the contract for erecting a building to specify times when payments are to be made, and requiring twenty-five per cent of the price to be retained until thirty-five days after completion, partial payments, however they are specified as to time, may be safely made, provided no notice of their subcontracts is given by materialmen, in the absence of which they must rely on the responsibility of the contractor, and the twenty-five per cent required to be retained; and in such case they are not injured by any uncertainty as to the times of payment specified nor by payments in advance of the specified time.

Mechanics' Liens—Contract for Building.—All That Materialmen can require, in such case, is that at the time they serve written notice upon the owner, or, if no notice is served, at the time their lien is filed, there shall be in his hands the amount required by the contract and said section.

Mechanics' Liens.—It Does not Prejudice Persons Furnishing a contractor material for erecting a building that the owner of the land purchased material from a firm of which he was a member, and furnished it to the contractor as a partial payment of the contract price, which partial payment he had a right to make.

Mechanics' Liens.—The Owner of a Building Who, Out of the Contract Price, has paid laborers who were entitled to file liens, and would have filed them but for such payment, and who has also retained out of the contract price the twenty-five per cent required by Code of Civil Procedure, section 1184, to be retained until thirty-five days after completion of the contract, is entitled to credit for such payment; and materialmen are not entitled to have the amount of such payment considered as part of the fund available for their claims, on the ground that there could be no privity between the owner and such laborers until they filed their liens, so as to entitle him to pay them.

Mechanic's Lien—Who must Sign Contract.—The mechanic's lien statute does not require that the contract for erecting a building shall be signed by the owner, and it is sufficient if it be signed by the reputed owner.

Mechanic's Lien.—A Contract for Erecting a Building, and also for improvements on an adjoining lot running "westerly," is not avoided by the fact that the recorded memorandum of the contract erroneously uses the word "easterly," nor is the sufficiency of the memorandum destroyed.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Consolidated actions by Charles Dunlop and others against Alice Kennedy and John F. Kennedy to enforce liens for material. From a judgment for plaintiffs, defendants, Kennedy, appeal. Reversed.

Attorney General Hart and Nowlin & Fassett for appellants; Parker & Eells for respondents.

HAYNES, C.—Consolidated actions to enforce liens of materialmen. Plaintiffs had judgment, and defendants Alice Kennedy and John F. Kennedy, the owners, appeal from the judgment and an order refusing a new trial.* On September 26, 1889, Alice Kennedy, wife of said John F. Kennedy, entered into a contract in writing with Gray & Stover, of which firm the defendant Stover is the surviving partner, by which they were to erect for her a three-story building (flats), and to furnish all materials and labor therefor, together with certain cement sidewalks and other walks on the same lot, and “also sidewalk in front of lot adjoining, running forty-two feet westerly, and all walkways and yard in connection with said lot.” The contract did not apportion the price of the work upon each lot, but the contractors were to be paid \$6,600 “at the times and in the manner following, to wit: Twenty-five per cent of the contract sum to remain unpaid until thirty-five days from and after completion of said building, and its acceptance by the within named architect. The remaining amount to be paid in partial payments in amount equal to seventy-five per cent of the value of the work done and materials furnished at the time of such payments.” The contract was not filed in the recorder’s office, but a memorandum of it was filed before the commencement of the work. Gray & Stover prosecuted the work until January 19, 1890, when Gray died, and Stover continued the work until February 18, 1890, when he abandoned the work before completion; and the owners, after due notice to the surviving contractor, continued the work, and completed it March 17, 1890. At the time of the contract there was a stable upon the lot, for which the contractors were to pay \$150, and remove it. On

December 21st, Kennedy paid the contractors \$3,000 in cash; and on January 14, 1890, the contractors receipted for \$4,000, which included the said payment of \$3,000, and \$1,000 for lumber furnished under the following circumstances: John F. Kennedy was a member of the Kennedy-Shaw Lumber Company, and he agreed with the contractors to furnish the lumber, and it was furnished to the contractors to the above amount, and used in the building, the lumber company charging it to Kennedy, and that amount was included in the receipt as paid upon the contract. At the time Stover abandoned the work there was due from the contractors to laborers \$285, which amount was at once paid by the owners to the laborers. There was also due from the contractors to materialmen at the date of abandonment, including the amount due the plaintiffs in the consolidated cases, \$2,656.74. The actual cost of completing the work in the manner the contract required was \$1,255.89. After completion, the owners estimated the balance of the contract price remaining in their hands at \$890.86, and offered to the respondents Towle & Broadwell, and to respondent Dunlop, and the other materialmen, their several pro rata shares of said sum. All except Towle & Broadwell and Dunlop accepted the offer, and received the payment in satisfaction of their several claims. Dunlop and Towle & Broadwell refused to accept the offer. Those accepting the settlement were five in number, and their claims aggregated \$998.74. Whether the offer was made to respondents before their liens were filed does not appear. The others did not file liens. The court found due to respondent Dunlop \$585, and to Towle & Broadwell \$1,073, besides costs and attorneys' fees to each, and that they were entitled to liens for those amounts. Other findings necessary to be noticed are that John F. Kennedy was and is the owner in fee of the premises, and that Mrs. Kennedy is the reputed owner; that no memorandum of the contract was ever filed, except that set out in the findings; that the defendants did not comply with the terms of the contract as to payments, but that on December 21, 1889, there was paid \$3,000 in cash, and on January 14, 1890, a receipt was given for that sum, and \$1000 for the lumber hereinbefore mentioned and that no cash payments were made, except said sum of \$3,000; and, as a conclusion of law, that the materials furnished by plaintiffs were furnished

at the personal instance of defendants. But whether this conclusion is based upon the supposed insufficiency of the contract and memorandum, as to the time of making partial payments, or upon the ground that overpayments were made, is difficult to ascertain. Both grounds are urged in respondents' brief, and require consideration.

If it were conceded that the contract and memorandum did not substantially comply with sections 1183 and 1184 of the Code of Civil Procedure, that fact would not, as respondents' counsel contend, make the contract void: *San Diego Lumber Co. v. Wooldredge*, 90 Cal. 578, 27 Pac. 431. It was said, however, in that case: "But the same consequence follows for a material nonconformity of the contract with the statute, under section 1184, so far as to permit materialmen and laborers to recover without regard to the amount due upon the contract." Said section provides that "the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work or on the completion of the work, provided that at least twenty-five per cent of the whole contract price shall be made payable at least thirty-five days after final completion of the contract." I think the contract in question substantially complied with the requirements of this section. The owner cannot with safety agree to pay a definite amount on a particular day, as he cannot know in advance whether the contractor will have earned the payment; and, if the payment is to be made upon reaching certain stages of the work, it only furnishes the means of ascertaining the day of payment when it actually arrives. The whole object of the provision is to protect materialmen, and any specification which accomplishes this purpose is sufficient. The partial payments, no matter how they are specified as to time, may safely be made, provided no notice of their subcontracts has been given by materialmen. These payments may therefore be anticipated and secured as a fund for the payment of their claims, by giving written notice as provided by statute. In the absence of such notice they must rely upon the personal responsibility of the contractor, and the twenty-five per centum of the whole contract price required to be retained for thirty-five days after the completion of the work; and in such case they are in no wise affected by any uncertainty as to the time when partial payments are to be made,

nor by payments thereof in advance of the time specified. If, however, a materialman gives written notice of his claim for materials furnished to the contractor before the time fixed for a partial payment, he thereby acquires an interest in that and subsequent payments, to the extent of his claim, and may hold the owner for the amount thereof, notwithstanding the fact that that payment was made before the notice was served. In this case, however, no notice was served, and it is therefore immaterial whether the contract was indefinite as to the time of payments. It requires the owner to have in his hands at all times at least twenty-five per centum of the value of the work done and materials furnished, so that at any time notice might be served the owner was liable for that proportion of the work actually done, as well as all the contractor should earn thereafter. The record does not show the value of the labor and materials done and furnished at the date of the payment of \$3,000, but the court found that at the date of Gray's death the work was not more than three-fourths completed. At that date the owners had paid \$287.50, more than seventy-five per cent of the work done. But Stover, the surviving partner, continued the work until February 17th, when he abandoned it. The testimony of the architect shows, without contradiction, that it cost to complete the work \$1,255.89, showing that the contractors had earned, at the time of the abandonment, \$5,344.11. Seventy-five per cent of that sum is \$4,008, showing in the hands of the owners \$8 more than the twenty-five per cent required by the contract to be retained from partial payments. All that materialmen can require is that at the time they serve written notice upon the owner. or, if no notice is served, at the time their lien is filed, there shall be in the hands of the owner the amount required by the contract and the law; and, if that amount is in his hands, there can be no liability resting upon him or his property beyond it. The statute must have a reasonable construction as well for the protection of the owner as of the materialman. It would be no hardship upon materialmen if their right to a lien were by statute made to depend upon prompt notice to the owner of their agreement with the contractor to furnish materials; and if they would avail themselves of the right now given them by the statute, to serve written notice upon the owner, a very large amount of vex-

ations and expensive litigation would be wholly avoided. In this case the owners were not liable to laborers and materialmen for more than the balance of the contract price after deducting all proper credits, and the cost of completing the work in the manner required by the contract. In ascertaining this balance the court rightly excluded the item of \$150. the price of the stable sold to the contractors. It appears to have preceded the commencement of the work, and therefore within the express letter of the statute, though it does not appear that respondents were or could have been injured by the payment.

I am unable to ascertain from the findings whether the court considered the \$1,000 paid by the lumber transaction as a payment. Respondents' counsel insist that it is not a payment, as against them. It is true Mr. Kennedy, in his testimony, spoke of it as an "offset." The name given to a transaction, especially by a nonprofessional witness, does not change its character. The contract required the contractor to furnish all materials, and neither the contract nor the law restricts him as to the person from whom he shall purchase them. The lumber was delivered to and used by the contractor in the erection of the building. No question is made as to the price paid for the lumber, nor that any injury or injustice did or could accrue therefrom to respondents. The Kennedy-Shaw Lumber Company had no interest in the erection of this building. They had the right, for their own protection, to require that the owner should become personally liable. Suppose that one of these respondents should have pursued that course, and had been paid by Kennedy with the consent of the contractor. Could the other have objected? The statute is not aimed at transactions such as this. The "prior or subsequent indebtedness, offset, or counterclaim in favor of the reputed owner and against the contractor," mentioned in the statute, applies to dealings of a different character, and was intended to prevent transactions between the owner and contractor by which the contractor's ability to pay for material might be diminished or destroyed. Materialmen are not privies to the contract, and can have no possible interest in it, further than above indicated.

I also think that appellants should be allowed the amount paid to the laborers and to the other materialmen. The bill

of exceptions contains the following: "It was admitted by Mr. Eells, who represented the plaintiffs on the trial, that the various claims on account of which the defendants, Kennedy, paid a pro rata to the various mechanics and materialmen for materials and work performed previous to the abandonment of said contract were correct, and the parties were entitled to file a lien, except for the artificial stonework, and for the fences and curbs set on and in front of the adjoining lot, and would have done so if the payments had not been made, but it was not admitted that they, or any of them, would have filed good liens." Respondents contend that until liens are filed there is no privity between the owner and subcontractors; that no money was due them from the owners, and none could be paid until after liens were filed, complying with all the essential requirements of the statute. As a general proposition, that is true, and fully supports the position hereinbefore taken touching the payments made by the owners to the contractors. But the admission above quoted is very broad. It concedes that the claims of these laborers and materialmen were correct; that they were entitled to file liens therefor, except as to work on the adjoining lot, and would have filed them, but for the payment. The qualification that it is not admitted that they would have filed "good liens" does not change the situation. Being entitled to file liens for the amount of their several claims, and it appearing that they would have filed them, we cannot assume, at the expense of the owner, that they would have so defectively prepared them as to render them invalid. The presumption is the other way. Actions to enforce liens under the mechanic's lien law, though statutory, are in their essential features equitable. If liens had been filed the laborers would have been entitled to the first lien, and payment in full, while the materialmen would have shared in the remainder of the fund pro rata with respondents, and the fund would have been diminished by additional costs and attorneys' fees if the settlement had not been made. Respondents were therefore benefited, instead of injured, by the settlement made; though not so largely benefited as they would be if they compel the owner to pay a like sum to them in addition to what they are equitably entitled to. The same offer was made to respondents, but, whether before or after their liens were filed, does not appear. As to the work done upon the adjoining lot,

it was all included in the one contract for a lump sum, and it cannot be divided so as to apportion it between the two lots. The work upon the adjoining lot was all of a character for which a lien is given by the statute (Code Civ. Proc., sec. 1191), and when materials have been furnished under a single contract for buildings or improvements on two or more contiguous lots owned by the same person a lien may be filed against all: *Lyon v. Logan*, 68 Tex. 521, 2 Am. St. Rep. 511, 5 S. W. 72. The fund sought to be reached by respondents in part accrued from work and materials bestowed upon the adjoining lot, and if they can file a valid lien upon one lot under such contract (a point not argued or decided), I fail to see why all laborers and materialmen may not file valid liens upon the lot upon which the building was erected, and upon which alone respondents filed their liens. Besides, a conclusive answer to the exception contained in the admission of respondents is that the record does not show that any of the claims settled and paid by appellants were for work done upon the "adjoining lot." I think these payments should have been allowed to defendants in reduction of the fund.

It is also urged by respondents that the contract does not conform to the requirements of the statute, because it was signed only by Mrs. Kennedy, while the court found that her husband, John F. Kennedy, was the owner in fee. The statute does not require that the contract be signed by the owner. It is sufficient if signed by the reputed owner, and it was found that Mrs. Kennedy was the reputed owner. Besides, the owner, not having given notice as required by the statute that he would not be responsible for the improvements upon his property, is as conclusively bound, so far as laborers or subcontractors are concerned, as though he had made the contract.

The contract described the adjoining lot as running forty-two feet "westerly," while in the memorandum "easterly" was inserted instead. The error did not destroy the sufficiency of the memorandum. It was described as "the lot adjoining" the lot first described; and as a misdescription does not avoid a contract of this character (*Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111), the error was capable of correction by proper averment and proof.

The payments by the owners to the laborers and materialmen (other than the respondents) were alleged in the answer,

but there was no finding as to the fact of payment. The findings, as made, however, do not support the judgment, inasmuch as the facts found show a balance in the hands of the owners much less than the amount of the liens adjudged to the respondents, the judgment being based upon an erroneous conclusion of law that the materials supplied by plaintiffs were furnished at the special instance and request of the owners. The judgment and order appealed from should be reversed.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

PALMTAG *v.* ROADHOUSE et al.

No. 15,018; August 31, 1893.

34 Pac. 111.

Statute of Limitations—Estoppel to Plead.—The fact that a mortgagor was the general attorney of the mortgagee in other matters does not make the position of the mortgagor a fiduciary one, or render it anything but adverse to the mortgagor's interest, as far as the mortgage is concerned, so as to estop him to set up the statute of limitations to an action of foreclosure.

Limitation of Actions—Demurrer.—Under the California Practice, when all the facts that defendant would be required to prove to sustain his plea of the statute of limitations appear on the face of the complaint, defendant may take advantage thereof by demurrer; but, to uphold a demurrer, the complaint must show, not that the cause of action may be barred, but that it is barred.¹

¹ Cited and approved in *Gatlin v. Vant*, 6 Ind. Ter. 256, 91 S. W. 39, it being said there: "The defense of limitations cannot be raised by demurrer unless it distinctly appears on the face of the complaint that the action is necessarily barred."

Cited and followed in *In re R. E. Radke Co.*, 193 Fed. 738, where a demurrer had been interposed to a petition in involuntary bankruptcy. The business of the company had been buying and selling real estate, holding and renting it, building, etc., and the claim of the petitioners was for labor and materials furnished. The court said: "It is impossible for the court to say that the labor and materials were not furnished within sixty days before the original petition was filed. Therefore, in so far as it rests on this ground, the demurrer must be overruled. To uphold a demurrer for this cause the complaint should show, not that the cause may be barred, but that it is barred."

APPEAL from Superior Court, Monterey County.

Action by Frederika Palmtag against George W. Roadhouse and Emma Roadhouse, his wife, to foreclose a mortgage. From a judgment for defendants, plaintiff appeals. Reversed.

James Hall and Cross & Hall for appellant; S. F. Geil and John J. Wyatt for respondents.

SEARLS, C.—This is an action brought to foreclose a mortgage given by the defendants, George W. Roadhouse and wife, to secure a promissory note for \$1,550 and interest, made by said defendants, Roadhouse and wife. The note and mortgage were dated March 25, 1885, and the note was payable to Frederika Palmtag, or order, one year after date. The action was commenced July 9, 1890—as may be seen, more than four years after the maturity of the note. Defendants demurred to the complaint upon the ground, among others, that the cause of action was barred by the provisions of section 337 of the Code of Civil Procedure of the state of California. Plaintiff, in her complaint, and with an evident view to avoid the apparent bar of the statute of four years, inserted in her complaint the following statement: “That said defendant George W. Roadhouse is an attorney and counselor at law, and engaged in the practice of law at Salinas City, Monterey county, California, and that plaintiff is a widow woman, residing at Watsonville, Santa Cruz county, California, and that the facts set forth in this paragraph have existed for several years last past. That for about five years last past said defendant George W. Roadhouse has been acting as the attorney and confidential agent for this plaintiff, and plaintiff always had full faith in his honesty and uprightness, and placed implicit confidence in his declarations and advice to her. That at various and sundry times between March 25, 1886, and March 25, 1890, defendant George W. Roadhouse told plaintiff and wrote to plaintiff that she need not trouble herself about that note and mortgage (meaning the note and mortgage set out in this complaint); that he would pay it before it outlawed, or words to that effect; and various and sundry other statements of like import, all of which statements plaintiff fully believed and relied upon. That plaintiff is a woman not conversant with

business affairs and matters, and relied implicitly on the afore-said assertions of her agent and attorney. That defendant George W. Roadhouse was at all times herein mentioned the husband and agent of defendant Emma Roadhouse, and acted in that capacity in all matters pertaining to said note and mortgage. That said defendant Emma Roadhouse, as plaintiff is informed and believes, and therefore alleges, well knew each and every fact set out in this paragraph before March 25, 1890, and agreed thereto and acquiesced therein." The demurrer was sustained by the court, and, plaintiff declining to amend, final judgment was entered in favor of defendants, from which judgment the plaintiff appeals.

The doctrine of estoppel, invoked by appellant against the defendants, cannot be maintained. It is not made to appear that George W. Roadhouse occupied any fiduciary relation to plaintiff in the matter of the note and mortgage. His position as to that transaction was adverse to the plaintiff, and the fact that he was her attorney in other matters did not alter his status in this respect; at least, it cannot be presumed to have done so, in the absence of express averments on the subject.

2. The complaint stated facts sufficient to constitute a cause of action, and the demurrer was evidently sustained upon the theory that plaintiff's cause of action was barred by the provisions of section 337 of the Code of Civil Procedure (statute limiting actions to four years). The attempted averment of facts in avoidance of the statute is not explicit and clear, and the complaint would have been open, perhaps, to a demurrer upon the ground that the complaint was ambiguous, unintelligible, or uncertain; but a demurrer to a cause of action, upon the ground that it is barred by the statute of limitations, can only be sustained where the pleading shows it clearly open to objection. To uphold a demurrer for this cause, the complaint should show, not that the cause of action may be barred, but that it is barred. Where, from the pleading, the question is left in doubt, any answer setting up the plea should be resorted to: *Farris v. Merritt*, 63 Cal. 118; *Harmon v. Page*, 62 Cal. 448; *Smith v. Richmond*, 19 Cal. 477; *Barringer v. Warden*, 12 Cal. 311. At common law the statute of limitations can only be interposed by plea, and could not be urged upon demurrer to the declaration, although apparent upon its face. In equity the rule was that, if all the facts

which a defendant would be required to prove to sustain his plea appeared upon the face of the complaint, the defendant might take advantage of it by demurrer. We have substantially adopted the equitable mode of pleading, and with it the practice of permitting the statute of limitations to be interposed by way of demurrer in a proper case. In the present case I am of the opinion that, admitting all the facts of the complaint to be true, including those defectively pleaded, but not objected to, defendants were not entitled to judgment upon the ground that the plaintiff's complaint showed her demand to be barred by the statute of limitations. It follows that the judgment of the court below should be reversed and the court directed to overrule the demurrer to the complaint, with leave to defendants to answer.

We concur: Belcher, C.; Vancielief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment of the court below is reversed, with directions to overrule the demurrer to the complaint and with leave to defendants to answer.

HINCKLEY v. KRUG.

No. 19,161; August 31, 1893.

34 Pac. 118.

Attorney—Liability to Client for Negligence.—A client cannot recover of his attorney damages on account of negligence, in the absence of any injury to the client caused by such negligence.

Attorney—Action for Services—Negligence as Defense.—In an action by an attorney to recover for professional services, defendant claimed damages for incompetency and negligence, and there was evidence that he employed plaintiff to prosecute certain actions to judgment for a fixed sum in each case, and that plaintiff was discharged before judgment for negligence and incompetency, in failing to file his pendens in two foreclosure suits. Held, that evidence that plaintiff explained to defendant the effect of filing and failure to file such notices, and the probable expense, and that defendant said he did not want to spend the money for filing them, was admissible.

Attorney—Action for Services—Negligence as Defense.—In such case it is not error to exclude evidence that part of the property covered by one of the mortgages plaintiff was employed to foreclose was conveyed by the mortgagor before, but the deeds were not recorded until after, the foreclosure suit was commenced, where it appears that the remaining property sold for enough to satisfy defendant's judgment.

Attorney—Action for Services—Negligence as Defense.—Where part of the services for which plaintiff seeks to recover consisted in examining the title to a lot, it is error to exclude evidence that, through the advice of plaintiff that the title was clear, defendant purchased the lot, and was afterward compelled to redeem it from a prior tax lien.

Attorney.—It is not Unprofessional Conduct on the part of an attorney to bring an action on a just claim against a nonresident, and serve summons by publication, when employed to do so, with the hope that possibly the defendant therein will pay the judgment obtained, on its being sent to the place where he resides, though such attorney knows such action cannot be maintained for want of jurisdiction.

Attorney—Suit for Services—Defense.—But if the attorney advised his client, in such case, that the service by publication was good and a valid judgment could be obtained, such attorney cannot recover for services rendered therein.

Attorney—Partial Payment of Fees—Manner of Crediting.—Where an attorney renders services in various matters, and the client makes a partial payment "on account of fees for legal services," the attorney cannot credit the money on certain items of his account so as to place them beyond controversy.¹

APPEAL from Superior Court, Los Angeles County; J. W. McKinley, Judge.

Action by A. G. Hinckley against August Krug on an account for professional services rendered by plaintiff, as an attorney, for defendant. From a judgment entered on the verdict of a jury in favor of plaintiff, and from an order denying his motion for a new trial, defendant appeals. Reversed.

Lacey & Trask and D. K. Trask for appellant; A. G. Hinckley and Calvin Edgerton, for respondent.

¹ Cited in the note in 96 Am. St. Rep. 73, on application of payments.

TEMPLE, C.—This appeal was taken by the defendant from the judgment and from the order refusing a new trial. It is an action to recover \$675 for services as attorney at law, alleged to have been rendered defendant “between the first day of June, 1889, and the first day of June, 1891, in prosecuting and defending suits, and for like services, at his request, in drawing, copying, and engrossing of divers conveyances, deeds, and other paper writings, and for divers journeys and other attendances,” etc. The defense consists of a general denial and of six counterclaims for damages alleged to have been caused by the negligence and incompetency of plaintiff as attorney, and of a demand for \$125, money due from plaintiff to defendant. The case was tried with the aid of a jury, which rendered a general verdict against defendant for \$325. The defendant not only attempted to recoup damages resulting from alleged negligence and incompetency of the plaintiff, but he claimed at the trial that such negligence and incompetency justified defendant in discharging plaintiff as his attorney, and that he was compelled to and did discharge him before the services were completed, and, further, that plaintiff had contracted to perform the services for a stipulated compensation for the entire services. Upon this point the court properly instructed the jury that under such circumstances, the contract being an entirety, plaintiff could not recover for his services. It is important to bear in mind, therefore, that the question of negligence is presented in two ways: First, on a claim to recover damages, and as a justification for the discharge of plaintiff as his attorney before the completion of the stipulated service. An action could not be maintained on account of the negligence or incompetency unless injury had resulted to the client, but the same negligence might justify and necessitate the discharge of the attorney, to avoid damage.

The first alleged error consists in an order striking out the first claim for damages, on the ground that the averments show that defendant was not injured. I think this ruling correct. It was averred that, in an action to foreclose a mortgage, plaintiff, through negligence, failed to file a notice of the pendency of the action. It appeared that no one acquired any interest in the mortgaged premises during the pendency of the suit; that defendant purchased the premises at the mortgage sale, paying the full amount of his debt and costs. It was not

alleged that he was ignorant of the defect, if it was a defect. Not having been injured, he could not maintain an action for the alleged negligence. There was evidence at the time tending to show that defendant had employed plaintiff as his attorney to prosecute certain actions to final judgment for a fixed and stipulated fee in each case, and that plaintiff had been discharged as such attorney, before the actions had been brought to judgment, for alleged negligence and incompetency, consisting partly in his failure to file such notices in two actions to foreclose mortgages for defendant. In regard to the matter the testimony of plaintiff and defendant was conflicting. Plaintiff testified: "Krug did not want to spend the money for filing them. I explained to him that, if no notice of action was filed, people who bought interests in the property could come in at any time and redeem. He said he did not want any such paper filed; the more people came in and redeemed, the better. I told him the expense in the Eddy suit would probably be four or five dollars for the *lis pendens*. I explained to him that he would have to have the title searched again before he took the decree, to see that nothing appeared of record, and if he decided not to file his *lis pendens* he would put me to that much extra trouble." The defendant testified positively that no such conversation occurred, and that nothing was said upon the subject; that he did not know that such a notice was required. Defendant objected to the testimony of plaintiff in regard to the conversation, and assigns the ruling admitting the testimony as error. The evidence was mainly directed to the question as to whether defendant was justified in discharging plaintiff as his attorney. While it may be doubted whether plaintiff sufficiently excused himself, I think the evidence was competent. Defendant complains, also, of certain instructions in regard to this matter, but the statement fails to show that any exception was reserved to the instructions at the trial.

At the trial defendant offered in evidence a certificate of sale for taxes of a certain lot assessed to one Lossing, in which it appeared that taxes had not been paid upon the lot for the fiscal year 1887; also, a tax deed to one Tring for the lot, on failure to redeem; also, to show that defendant held a mortgage upon this lot; that the mortgagor proposed to convey the property to defendant in full payment, which offer the

defendant accepted, provided he could get a good title, and employed plaintiff to examine it for him and to attend to the conveyance; that, through the advice of plaintiff that the title was clear, he took the deed, and then had to purchase the tax title, at a cost of \$50. Plaintiff objected to this evidence on the ground that Lossing, the mortgagor, was admitted to be insolvent, and the tax lien was superior to the lien of the mortgage, and therefore defendant would have been compelled to redeem from the tax sale, even if he had foreclosed his mortgage. The objection was sustained and defendant excepted. It is not necessary to say whether this evidence was inadmissible to prove the claim for damages founded upon this charge of negligence. It was clearly admissible, as going to the value of plaintiff's services. The service was within the allegations of the complaint.

Defendant also offered to show that a portion of the property included in one of his mortgages which he employed plaintiff to foreclose, for which service plaintiff is seeking compensation in this action, had been conveyed before the suit to foreclose was commenced, but that the deeds had not been recorded. This evidence was offered to show damage from failure to file notice of the action. But under the supposed conditions, as the remaining property was sold for enough to satisfy the defendant's judgment, the notice would have had no effect upon the alleged purchasers before the institution of the suit: Code Civ. Proc., sec. 726. The evidence was properly excluded.

The defendant asked the court to give the following instruction: "If an attorney brings an action that he knows cannot be maintained, merely for the purpose of 'bluffing' and 'bulldozing' the defendant, he is guilty of unprofessional conduct, violates his oath as an attorney, and cannot collect any compensation for services rendered in such action"—which instruction the court refused to give and defendant duly excepted. Such refusal is assigned as error. Defendant had a money demand against Thacker, who was residing in Seattle, Washington. Thacker had no property in this state. A suit was commenced against Thacker by plaintiff, as defendant's attorney, and a summons was taken out and published. Plaintiff had agreed to prosecute the action to judgment for \$50, but was discharged before judgment was entered. Both par-

ties testified in regard to the institution of the suit. Defendant said that plaintiff told him that such service would be good, and that the judgment could be sent to Seattle and collected there. Plaintiff said: "I never intimated that we could get service of summons on them by publication when they were out of the state. There being no property in this state that we could levy upon, no attachment proceedings could be brought. I advised Mr. Krug against bringing the Thacker suits. I told him he could not recover anything on any judgment he might obtain. But, as he insisted on bringing the suit, I did the best I could. The object of the suit was not to recover any property, but was for a bluff—to bulldoze, embarrass and confound those defendants—and the publication of summons in that case was not for the purpose of getting service on the parties." And again: "I made as much fun of it at the time as I could; tried to persuade him from it, saying that I didn't believe that it would have any effect whatever." Now, disregarding the motives stated by the witness, what was there in this that could "bulldoze" or confound the defendants? The action was believed to have been upon a just demand—a fact contrary to the first assumption in the instruction asked. There was a possibility that the defendants would appear, and perhaps other suppositions might be made which would justify the proceeding. But even if it were thought possible that, upon sending such a judgment to Seattle, defendants might pay it, it being a just demand, and no deceit being practiced, I see nothing unprofessional about it.

Defendant also asked another instruction which the court refused to give, and such ruling is also assigned as error. It was as follows: "The court instructs you that the attempted service of summons on the defendants by publication, where defendants reside out of the state, and when no property is brought within the jurisdiction of the court by attachment or otherwise, or when the action is not brought to determine the status of a person, is ineffectual, and judgment thereunder is void; and if you find from the evidence that the plaintiff attempted to serve said defendants in said Thacker suit by publication, and brought no property under the jurisdiction of the court thereby, and if you believe from the evidence that plaintiff advised defendant that such service was good,

you must find against the plaintiff on his demand in said Thacker suit." I think this instruction should have been given. It is true an attorney is not always liable for mistakes, but here the plaintiff admits that he knew a judgment, under the circumstances assumed, would be invalid. The witnesses differ as to the facts, but the defendant had a right to have an instruction based upon the supposition that the jury would adopt his testimony. Plaintiff's counsel says they are not seeking to recover compensation for this service. But I think they are. It is clearly included in the complaint, and is found in the bill of particulars furnished by plaintiff. It is there marked "Paid."

It seems defendant made a payment of \$125 generally "on account of fees for legal services." Plaintiff, in his bill of particulars, appears to have credited this upon certain items. He could not do this and thus retain the money and place those items beyond controversy. Besides, defendant claims to recover this money on a counterclaim. It would be a matter in controversy, even if in no other way. I think the judgment and order should be reversed and a new trial had.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed and a new trial ordered.

TOBIN v. OMNIBUS CABLE COMPANY.

No. 15,162; August 31, 1893.

34 Pac. 124.

Street Railway—Premature Starting of Car.—In an action against a cable-car company for injuries received in alighting from a car alleged to have been prematurely started, after instructing the jury that common carriers of passengers must use such vigilance and foresight as they can, under the circumstances, in view of the character and mode of conveyance adopted, to prevent accidents, it was not improper to instruct that "it was the defendant's business to know, before starting up the car, whether passengers getting off or

on the car were in a position to be injured, and it would be negligence to start the car suddenly, under such circumstances, without exercising every precaution for the safety of those who might be getting off or on."

Negligence.—One is Guilty of Contributory Negligence if he is guilty of want of ordinary care, and the want of extraordinary care merely is no defense.

Negligence—Concurring Negligence as Defense.—Negligence on plaintiff's part, amounting to absence of ordinary care, which, concurrently with the negligence of defendant, proximately contributes to the injury, is a good defense, whether or not defendant, with ordinary or extraordinary care, could have guarded against it.¹

Street Railway—Injury to Passenger Alighting.—In an action against a street-car company for personal injuries, plaintiff claimed, and the evidence tended to prove, that a car was started while she was alighting therefrom, while defendant claimed, and gave evidence to show, that the car was started before plaintiff left her seat, and that she tried to get off while the car was in motion. Held, that an instruction making the defense of contributory negligence dependent on whether defendant could have guarded against such negligence was rendered harmless by subsequent instructions that the verdict must be for the defendant if the injuries were caused either solely by plaintiff's negligence, or, jointly and concurrently, by the negligence of plaintiff and defendant or its servants, and that if plaintiff, knowing the car was in motion, chose to run her chances, and get off by stepping directly out from the car, she must abide the risks she took.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by Mary Tobin against the Omnibus Cable Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

C. H. Wilson for appellant; Henley & Swift for respondent.

VANCLIEF, C.—The defendant is an incorporated cable railway company, operating on Post street and certain other streets in the city of San Francisco. The plaintiff was a passenger on one of defendant's cars, and, while attempting to

¹ Cited in the note in Ann. Cas. 1912-B, 890 on concurrent negligence of plaintiff as defeating recovery under doctrine of last clear chance.

alight from the car at the junction of Post and Kearny streets, was thrown upon the pavement by the movement of the car and personally injured. This action was brought to recover \$30,000 damages for the injury, which, it is alleged, resulted solely from the negligence of the defendant. A trial by jury resulted in a verdict for plaintiff, assessing the damages at \$10,000. On defendant's motion for a new trial the court ordered that if, within ten days, the plaintiff remit \$3,000 from the damages assessed by the jury, the motion for new trial "will be denied, otherwise it will be granted." The plaintiff accordingly remitted \$3,000 and a new trial was denied, and judgment entered for \$7,000. The defendant appeals from the judgment, and from the order denying a new trial.

1. Counsel for appellant contends that the evidence is insufficient to justify a verdict of negligence on the part of the defendant, and, if it is, that it shows contributory negligence of the plaintiff. As to each of these issues, there is a substantial conflict of evidence, and therefore the verdict should not be disturbed on either of these grounds. Whether there was negligence of defendant, or contributory negligence of the plaintiff, ultimately depends upon whether the car was started while plaintiff was in the act of getting off, under such circumstances that, with due care for her safety, the gripman could and would have discovered that she was in the act of alighting before he started the car, by the movement of which, it is admitted, she was thrown down and injured. The plaintiff was seated on the left-hand side of the open section of the car (the dummy), in the middle compartment of that seat; there being three compartments, each sufficient to seat two passengers. She occupied the rear of the apartment, so that her right side adjoined the middle of the seat. The gripman stood at or near the center of the dummy while gripping the cable, and as near to the plaintiff's seat as to any other seat on the dummy. The plaintiff testified: "I was alongside of the gripman. My right shoulder was right together with his arm"—and this was not disputed. The gripman, Mr. Huntly, testified: "I do not pay any attention to the passengers upon the inside of the car. The conductor looks after them. It is my duty to look after the passengers that are on the open section, with reference to their getting on or off."

There are two steps below the seat, and plaintiff's feet, while sitting, rested on the upper step, so that in getting off she must have descended two steps. The evidence on the part of plaintiff tends to prove that she was making the second step, having one foot on or near the ground, the other upon the lower step, and holding to the stanchion with her left hand, when the gripman suddenly started the car, and also tends to prove that with ordinary care the gripman would have seen that plaintiff had risen from her seat, and was stepping down, before he gripped the cable. To these points the testimony of the plaintiff and Mrs. Meyers is quite positive, and to some extent is corroborated by Morris Sperling, a witness on the part of defendant. It appears that the plaintiff was sixty-four years of age, and that by the fall she was permanently injured, by a fracture of the neck of the femur.

2. It is claimed that the court erred in instructing the jury that "it was the defendant's business to know, before starting up the car, whether passengers getting off or on the car were in a position to be injured; and it would be negligence to start the car suddenly, under such circumstances, without exercising every precaution for the safety of those who might be getting off or on." As applied to the cable street-cars of the defendant, and to the facts of this case, in connection with other instructions given, the instruction seems to be correct. It does not, as contended by counsel, instruct that it would be negligence on the part of the defendant not to know absolutely, under all circumstances, that passengers getting off or on are not in a condition to be injured, but that "it would be negligence to start the car suddenly, under such circumstances (the circumstances of this case), without exercising every precaution for the safety of those who might be getting off or on," and that it was defendant's "business" to know (not that it must absolutely know under all circumstances) that passengers were not in a condition to be injured by starting the car. The court had before defined the degree of care required of common carriers of passengers as follows: "Common carriers of passengers are required to do all that human care, vigilance, and foresight reasonably can, under the circumstances, in view of the character and mode of conveyance adopted, to prevent accidents to passengers." Read in connection with this, the instruction in question could not

have been understood to mean that the failure of the defendant to know, under all circumstances, whether passengers are in condition to be injured by starting the car, is negligence.

3. The court, of its own motion, gave the following instruction as to the law of contributory negligence, in addition to instructions upon the same subject before given at the request of counsel for defendant: "Now, here is an instruction—a definition of this matter of contributory negligence—which is sometimes confusing to a jury, and which I will give you as follows: 'Contributory negligence' is defined to be, not any degree of negligence, however slight, which concurs in producing an injury, but it must be negligence amounting to the absence of ordinary care, and which contributes proximately or directly to the injury complained of, and against which negligence the defendant, being aware of it, could not have guarded." Immediately after this instruction was given, counsel for defendant asked if it was given by the court of its own motion, saying, if it was, he would like to except to it. Upon being informed by the court that it was given by the court, counsel said: "Then I desire to take an exception as to that. I understand I have to do that now," but stated no ground of objection to the instruction, though he seems to have understood that it was oral. In his brief here, for the first time, counsel states two grounds of objection to this instruction: First, that it defines the degree of contributory negligence necessary to constitute a defense to be a want of only ordinary care on the part of the passenger, whereas it is claimed that a want of extraordinary care, contributory to the injury in the slightest degree, is sufficient to constitute a defense. I think this objection is answered in the opinion of this court, by Mr. Justice McKinstry, in the case of *Robinson v. Railroad Co.*, 48 Cal. 422, 423, where it was said: "The law regards the plaintiff as innocent . . . unless the evidence shows a want of ordinary care and prudence on his part. His failure to take great care is no defense: *Shearman & Redfield on Negligence*, sec. 29. The formula is, not that any degree of negligence on the part of the plaintiff, which directly concurs in producing the injury (however slight), will constitute a defense; but if the negligence of the plaintiff, which amounts to the absence of ordinary care, shall con-

tribute, in any degree, proximately to the injury, the plaintiff shall not recover." This was repeated in the case of *Strong v. Railroad Co.*, 61 Cal. 328, wherein the court, by the same learned justice, said: "Plaintiff had a right to rely upon the performance, by those on the locomotive, of every act imposed by law upon them when approaching a crossing. In a legal sense, he was innocent of negligence unless there was a want of ordinary care and prudence on his part. The rule is not that any degree of negligence, however slight, which directly concurs in producing the injury, will prevent a recovery; but if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately, in any degree, to the injury, the plaintiff shall not recover": See *Beach on Contributory Negligence*, sec. 20.

The second objection to the instruction is that the last clause of the instruction, in these words, "and against which negligence the defendant, being aware of it, could not have guarded," is erroneous, in that it requires of the defendant more than ordinary care to guard against injurious consequences from negligence of the plaintiff of which defendant was aware; it being claimed that this last clause of the instruction should have been qualified by adding thereto the words, "by the exercise of ordinary care"—that is to say, that the carrier, though notified of such negligence of the passenger as exposes the latter to danger of personal injury, is required to exercise only ordinary care to avoid or avert the impending injurious consequences of such negligence, and not that extraordinary degree of care which would have been required but for the negligence of the passenger. Contributory negligence of the plaintiff, as a defense, in cases of this kind, implies negligence of some degree on the part of the defendant, and is consistent with any degree of mere negligence of the defendant. Therefore, whenever it is found that the negligence of the plaintiff—that is, want of ordinary care on his part—proximately contributed to his injury in any degree, then the degree of care or negligence on the part of the defendant becomes wholly immaterial: *Holmes v. Railway Co.*, 97 Cal. 161, 31 Pac. 834; *Beach on Contributory Negligence*, sec. 26. The instruction purports to be a definition of that species of contributory negligence which constitutes a defense, and states all the essential attributes

of that species, namely, "negligence amounting to the absence of ordinary care, and which contributes proximately or directly to the injury complained of," but erroneously added that it must be such negligence as the defendant, if aware of it, could not have guarded against. This additional attribute perverts the definition; and the qualification of it asked by appellant does not rectify the error, since negligence of the plaintiff, amounting to absence of ordinary care, which, concurrently with the negligence of defendant, proximately contributes to the injury complained of, is a good defense, whether the defendant could or could not, with ordinary or even extraordinary care, have guarded against it: Beach on Contributory Negligence, secs. 14, 35. It should be observed, however, that the negligence of defendant in such case is mere negligence, in the proper sense of the word, exclusive of malice, and consequently exclusive of such reckless conduct of defendant as would be sufficient proof of malice: Wharton on Negligence, secs. 14, 22. In a definition of the degree of care required of defendant in cases where the negligence of the plaintiff contributes to his injury only as a condition precedent, and remotely, and therefore does not constitute a defense, as in the line of cases of which *Davies v. Mann*, 10 Mees. & W. 545, *Needham v. Railroad Co.*, 37 Cal. 409, and *Meeks v. Railroad Co.*, 56 Cal. 513, 38 Am. Rep. 67, are examples, the qualification asked by appellant of the last clause of the instruction might have been material, and perhaps proper. But, in a definition of "contributory negligence" as a defense, the last clause of the instruction, either as given or with the qualification asked by appellant, had no proper place. It follows that, if the trial court had qualified the instruction as here proposed by appellant, the result would have been only to substitute one error for another, the refusal to do which, even at the special request of the defendant, would not have been error. But conceding that the exception, as taken in the lower court, is a sufficient foundation to support any objection to the instruction that counsel may desire to make here, still the only objection made here is that the court failed to qualify the instruction in the respect above stated, so that the error, such as it is conceded to be, is not pointed to or complained of here, and as a general rule this court will not reverse a judgment on account

of error not pointed out or complained of by the appellant; the reason for this being that, counsel for appellant having specified the errors of which he complains, it is presumed that he deems others, if such there be, either harmless or favorable to his client. If there is any exception to this rule, it will be found only in cases wherein it appears that the error not objected to was at least probably prejudicial to the appellant, and this case is not of that class. Indeed, I cannot conceive how the defendant could have been injured by the instruction in question. It was not questioned that plaintiff was guilty of contributory negligence, and therefore could not recover, if she started to alight after the car had started; and the very concrete instructions given at request of defendant were to this effect, and quite as favorable as defendant was entitled to ask. Among these were the following: "Fourth. The jury are instructed that if they find from all the evidence that the injuries in question were occasioned either solely by the negligence of the plaintiff, or, jointly and concurrently, by the negligence of the plaintiff and the defendant or its servants, then the verdict should be for the defendant"; and again: ". . . . Eighth. If the jury believe from the evidence that the plaintiff, knowing that the car was in motion, chose to run her chances, and get off by stepping directly out from the car, she must abide the risks that she took." The plaintiff claimed, and the evidence on her part tended to prove, that the car was started while she was in the act of alighting; and, on the other hand, defendant claimed, and gave evidence tending to prove, that the car was started before plaintiff moved from her seat, and that she started to get off while the car was moving. There was no evidence, and appears to have been no claim, that the defendant, by any degree of care, possibly could have avoided the accident after the car started. Under the instructions given at defendant's request, the verdict must have hinged solely upon the questions whether the plaintiff was in the act of alighting before the car started, and whether, with due care, the gripman would have known that fact before he started the car; and, upon conflicting evidence, the jury resolved both these questions against the defendant. In respect to whether the conceded error was harmless or not, this case seems entirely analogous to that of *Craven v. Railroad Co.*, 72 Cal. 345, 13 Pac. 878,

in which an instruction defining "contributory negligence" was excepted to on a valid ground, and conceded to be erroneous, but held to be harmless, and therefore not a sufficient cause for a reversal of the judgment.

4. It is contended that, when the court found that the damages assessed by the jury were excessive, it should have granted a new trial on that ground, and had no authority to refuse it on the condition that plaintiff would remit \$3,000. After the remittal of \$3,000, no legal ground appears for holding the damages recovered (\$7,000) excessive. That the trial court had authority to make the conditional order complained of, and did not err in making it, is too firmly established in this state to be questioned. I think the judgment and order should be affirmed.

We concur: Haynes, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

SECURITY SAVINGS BANK AND TRUST COMPANY v.
BOARD OF SUPERVISORS OF LOS ANGELES
COUNTY et al. MAIN STREET SAVINGS BANK
AND TRUST COMPANY v. SAME. LOS ANGELES
SAVINGS BANK v. SAME.

Nos. 14,885, 14,886, 14,887; August 31, 1893.

34 Pac. 437.

Taxation—Omission of Property.—An Order of the Board of Equalization finding that a bank has omitted property from the list of its taxable property, and should be assessed thereon, and directing the assessor to add such property to its assessment, is not an attempt by the board to add property to the list, and exercise assessorial powers, but is a direction that the assessor make such addition, though the order specifies the value of the property to be added, and is authorized by Political Code, section 3681, requiring the assessor, at the request of the board, to list and assess property which he has failed to assess.

Taxation—Omitted Property.—Political Code, Section 3681, under which the assessor is required, at the request of the board of equalization, to list and assess property which he has failed to assess, which section the city charter of Los Angeles makes applicable to the common council, sitting as a board of equalization, does not conflict with the constitutional provisions which define the powers and duties of state and county boards of equalization, and which do not give the power to cause property to be added to the assessment list, since it merely extends the power and duty of the assessor.

Taxation—Board of Equalization.—A Notice to a Bank to Appear Before the board of equalization, and show cause why its "assessment on solvent credits should not be increased from \$2,774 to \$275,000," sufficiently informs it that it is proposed to add property to the assessment.

Taxation—Board of Equalization.—A Person Appearing Before the board of equalization in response to a notice, and submitting to the action of the board, waives any defect in the notice.

Taxation—Board of Equalization.—A Finding by the Board of equalization that a person has omitted taxable property from his list to a certain amount is conclusive on the courts on writ of review, since Code of Civil Procedure, section 1074, provides that the review on such writ cannot be extended further than to determine whether the inferior tribunal or board has regularly pursued its authority.

Taxation—Board of Equalization—Omitted Property.—Even if the fact that property has been so omitted is necessary to give the board jurisdiction, the court cannot review the evidence to determine whether there was evidence to show such fact, since the fact is one to be determined by the board.

APPEAL from Superior Court, Los Angeles County; William P. Wade, Judge.

Petitions by the Security Savings Bank and Trust Company, Main Street Savings Bank and Trust Company, and Los Angeles Savings Bank for a writ to review an order of the board of supervisors of Los Angeles county, sitting as a board of equalization, directing property to be added to the assessments of petitioners. From a judgment annulling the order the board appeals. **Reversed.**

James McLachlan, Waldo M. York and B. M. Marble for appellant; Graves, O'Melveny & Shankland for respondents.

PER CURIAM.—In Farmers & Merchants' Bank v. Board of Equalization, 97 Cal. 318, 32 Pac. 312, most of the ques-

tions involved in this appeal were determined adversely to the respondent. The additional point now presented, that the legislature could not confer upon the state board of equalization authority to extend the time within which the county board of equalization could act, must also, under the principles declared in that case, be determined against the respondent; and, upon the authority of that case, the judgment is reversed.

HAWKINS et al. v. MOREHEAD et al.

No. 18,129; September 13, 1893.

34 Pac. 223.

Appeal—Record.—The Sufficiency of Testimony Contained in a transcript on appeal, unaccompanied by a certificate that it was given or is correctly stated, will not be considered.

APPEAL from Superior Court, Butte County; John C. Gray, Judge.

Action by William Hawkins and others against A. A. Morehead and others. From a judgment for defendant Morehead, plaintiffs appeal. Affirmed.

Wm. H. Schooler for appellants; Park Henshaw for respondents.

BELCHER, C.—This is an action to recover the value of certain materials furnished by the plaintiffs to the defendant Stauffer, and by him used in the construction of a house for the defendant Morehead, upon a lot of land owned by her, and to enforce a lien therefor on the said house and lot. The court below found, among other things: "That the amount agreed to be paid said contractor, Stauffer, for the erection of said house, was less than one thousand dollars; that defendant Morehead had paid Stauffer in full when the said claim of lien was filed, and that there was nothing due or owing to said Stauffer at said date; that no written notice

of any kind was given said Morehead by plaintiffs that they had furnished material or labor, either or both, to said Stauffer for said building; that said building was completed and occupied by a tenant on the third day of October, 1891, and that more than thirty days had elapsed after the completion of said contract and building before plaintiffs filed for record with the county recorder their claim of lien." And as conclusions of law the court found that plaintiffs were entitled to a judgment against Stauffer for the amount demanded, but were not entitled to have the same enforced as a lien on the said premises. Judgment was accordingly entered that the plaintiffs take nothing against defendant Morehead, and that she recover from them her costs. From this judgment in favor of defendant Morehead plaintiffs have appealed, and the case is brought here without any statement or bill of exceptions. The transcript contains nearly fifty pages of printed matter, purporting to be testimony given at the trial, but not accompanied by any certificate that it was in fact given, or is correctly stated.

It is argued for appellants that the findings were not justified by the evidence, and in support of this position numerous references are made to the testimony found in the transcript. The trouble with this argument is that the supposed testimony cannot be looked at or regarded here for any purpose. The rule has been too long settled to admit of discussion that the question of the sufficiency of the evidence to justify the verdict or decision can only be considered on appeal when the evidence is brought up in a statement or bill of exceptions, properly certified. The only question then left to be determined is, Does the judgment-roll show error? We do not think it does. The findings follow the pleadings, and fully support the judgment: See *Kerekhoff-Cuzner Mill & Lumber Co. v. Cummings*, 86 Cal. 22, 24 Pac. 814. We advise that the judgment be affirmed.

We concur: Temple, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

DE ARNAZ v. JAYNES et al.

No. 19,138; September 13, 1893.

34 Pac. 223.

Appeal—Service of Notice.—In an Action to Foreclose a mortgage, the owners of two-thirds of the property alleged that plaintiff, as mortgagee, had been in possession and received certain rents and profits, and prayed for an accounting. A demurrer to this answer having been sustained, judgment was rendered against such owners, and they appealed. The owner of the other third interest consented to judgment for plaintiff, the latter having waived a deficiency judgment. The mortgage debt bore interest at eight per cent, and the judgment at seven. Held, that notice of appeal must be served on the owner of the one-third interest, since he would be injuriously affected by a reversal of the judgment.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by Jose de Arnaz against James Jaynes, Joseph Moffatt, I. B. Conkling and others. From a judgment for plaintiff, the three named defendants appeal. Dismissed.

M. W. Conkling for appellants; Lee & Scott for respondent.

HAYNES, C.—This is an appeal from a judgment foreclosing a mortgage. Appellants Jaynes, Moffatt and Conkling, and J. M. Taylor, Andrew Stephens and others, were made defendants. The mortgage was executed February 3, 1887, by appellant Moffatt and one H. Clay Graham, since deceased, to secure their two joint and several promissory notes for the aggregate sum of \$20,540, with interest at eight per cent per annum, payable semi-annually, and if not paid, to bear interest at the same rate. Andrew Stephens was a lessee of the mortgaged property, and answered, setting up his interest. J. M. Taylor answered, alleging that he is the owner of an undivided two-thirds of the mortgaged premises, subject to the lien of the mortgage, and consenting that plaintiff be granted the relief prayed for in his complaint, including the appointment of a receiver. Defendants Jaynes, Moffatt and

Conkling (the appellants here) answered, admitting that no payments had been made upon the mortgage, and alleging that from December 1, 1887, to November 17, 1891, defendant Taylor owned an undivided two-thirds of the mortgaged property, and they the remaining one-third; that during the time above mentioned the plaintiff, as mortgagee, was in possession of the mortgaged premises, and received the rents and profits of the same, of the value of \$5,000, which should have been applied upon the mortgage; and prayed for an accounting. Plaintiff demurred to this answer. The demurrer was sustained, and, defendants declining to amend, judgment went against them. Of all the defendants, Moffatt was the only one personally liable for the mortgage debt; and plaintiff, in his complaint and in the judgment, waived a deficiency judgment, except as to the funds in the hands of the receiver. The notice of appeal was served only upon the plaintiff, and he, as respondent here, now insists that the appeal should be dismissed because of appellants' failure to serve the notice of appeal upon defendants Taylor and Stephens, both of whom, he contends, would be affected by a reversal of the judgment.

There was no personal judgment against any of the defendants, for a deficiency or otherwise, but there was a judgment against the whole of the property, and to which Taylor is a necessary party. If the judgment should be reversed, Taylor would necessarily be a party to further proceedings, else his interest in the mortgaged premises would not be foreclosed. Respondent suggests that as the mortgage debt bears interest at eight per cent, compounded semi-annually, while the judgment bears but seven per cent, Taylor would necessarily be injuriously affected, since the amount for which his property would be liable would be increased. On the other hand, appellants contend that plaintiff should be required to account for the rents and profits, as alleged in their answer, and that such accounting would diminish the amount for which Taylor's interest would be liable, and that, therefore, he would be benefited. But this must depend upon their success in compelling an accounting, and the amount for which the plaintiff may be required to account. Taylor, having consented to the judgment, could not appeal, and is therefore conclusively presumed to be satisfied therewith. What his reasons were for so consenting we can only conjecture.

It may be that he hoped, by having a prompt disposition of the case, and an early sale—thus preventing a continued accumulation of interest—that there might be a surplus to be distributed among the owners. It is just as essential that Taylor should be a party to proceedings in the appellate court, which necessarily affect him or his interests, as that he should be a party to the proceedings in the court below. In *Senter v. De Bernal*, 38 Cal. 640, it was said: “Every party whose interest in the subject matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an adverse party, within the meaning of these provisions of the code, irrespective of the question whether he appears upon the face of the record in the attitude of a plaintiff or defendant or intervener.” There the action was for partition. The court further said: “From the interlocutory judgment upon such issues, appeals may be taken by the party aggrieved, without making any persons parties to the appeal, except such as were parties to the issues; but no appeal from the whole of the final judgment can be made effectual unless all the parties to it are made parties to the appeal, either as appellants or respondents, for such a judgment cannot be reversed without affecting the interest of all who are parties to it”: See, also, *In re Castle Dome Min. & Smelting Co.*, 79 Cal. 248, 21 Pac. 746; *Millikin v. Houghton*, 75 Cal. 540, 17 Pac. 641; *Williams v. Association*, 66 Cal. 194, 5 Pac. 85; *O’Kane v. Daly*, 63 Cal. 318. Of course, all the cases concede that, if the omitted party would not be affected by a reversal or modification of the judgment appealed from, the appeal will be sustained; but this, I think, is as far as the court has gone, or could go, in any case. The appellate court having no jurisdiction to enter a judgment which would necessarily affect one not a party to the appeal, the other questions presented cannot be examined. I advise that the appeal herein be dismissed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the appeal is dismissed.

GILL v. DUNHAM et al.

No. 18,145; September 14, 1893.

34 Pac. 68.

Street Improvement—Publication of Resolution.—Act of March 14, 1889, amending act of March 18, 1885, in relation to improvement of streets, provides (section 3) that before ordering improvements the council shall pass a resolution of intention, which shall be "published and posted for two days in the manner prescribed by section 34." The latter section provides that resolutions required to be published shall be published in a newspaper, etc.; provided, however, that in case there is no newspaper, they shall be posted and kept posted for the same time as required for publication. Held, that a resolution which is published need not also be posted.

Street Assessment—Compliance With Statute.—Though acts which the statute requires to be performed before making a public improvement are conditions precedent to the power to levy a tax on the property owners, only a substantial compliance with the statute is required; and the assessment is not vitiated by want of technicality of expression, or precision of statement as to the work, which does not affect the essential object in view.

Street Improvements—Plans and Specifications.—Under acts of 1889, page 159, relating to public improvements, and providing that plans and specifications shall be furnished to the city council, if required by it, by the city engineer, but not specifying the mode of requiring them, the fact that they were prepared by the engineer, and were on file, and approved by the council, is sufficient evidence of their authenticity.

City Council—Notice of Special Meeting.—Where all the members of the council were present at a special meeting, except one, and a resolution was adopted unanimously, there is no error in admitting testimony of the clerk of the council that he served a proper notice of the meeting on all the members, the notice not having been entered of record.

Street Assessment.—In an Action by an Assignee to Enforce an assessment for a public improvement, which was against a certain lot, but to an unknown owner, the fact that the assignment, which describes the lot, also states that the assessment was to a certain person as owner, does not render it inadmissible, as the name of the alleged owner may be rejected as surplusage.

Street Assessment.—The Lien of an Assessment for a Public improvement is merely an incident of the demand, and passes with an assignment thereof.

Trial—Issues.—The Fact That Evidence is Introduced to contradict a fact alleged in the complaint is immaterial, where the fact is not denied in the answer, as there is no issue on the question.

APPEAL from Superior Court, San Joaquin County; Ansel Smith, Judge.

Action by T. A. Gill against S. Dunham and another to foreclose a lien for a street assessment. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Louttit, Woods & Levinsky for appellants; J. M. Kile and J. A. Plummer for respondent.

SEARLS, C.—This is an action to foreclose a lien for street assessment in the city of Stockton. The plaintiff had judgment as prayed for in his complaint, from which judgment and from an order denying a new trial defendants prosecute this appeal.

A demurrer was interposed by defendants to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action, and upon the further ground that the complaint is uncertain, in that it fails to show that R. R. Ramsbottom ever reassigned to plaintiff his interest in the amount assessed against the land in the complaint described. The complaint avers that the resolution of intention to perform the work in question was duly published in the "Stockton Daily Independent," a newspaper printed, published, and circulated at said city of Stockton, etc., and further avers that it was posted conspicuously on or near the council chamber door of the said council of said city of Stockton, and remained so posted for two days consecutively, etc. The resolution of intention was passed by the said council of the city of Stockton on the 14th of October, 1889, and subsequent to the passage of the act of March 14, 1889, amendatory of the act of March 18, 1885, entitled "An act to provide for work upon streets, lanes, alleys," etc. The question presented by the demurrer relates to the necessity of

posting the resolution of intention or notice thereof in three public places in the city. Section 2 of the amendatory act amends section 3 of the act of 1885, and reads, so far as applicable to the question in hand, as follows: "Sec. 3. Before ordering any work done or improvements made, which is authorized by section 2 of this act, the city council shall pass a resolution of intention which shall be published and posted for two days in the manner prescribed by section 34 of this act." Section 34 reads as follows: "Fourth: The notices, resolutions, orders or other matter required to be published by the provisions of this act and of the act of which this is amendatory shall be published in a daily newspaper in cities where such there is, and, where there is no daily newspaper, in a semi-weekly or weekly newspaper, to be designated by the council of such city, as often as the same is issued, and no other statute shall govern or be applicable to the publications herein provided for; provided, however, that in case there is no daily, semi-weekly or weekly newspaper printed or circulated in any such city, then such notices, resolutions, orders or other matters as are herein required to be published in a newspaper, shall be posted and kept posted for the same length of time as required herein for the publication of the same in a daily, semi-weekly or weekly newspaper, in three of the most public places in such city," etc. This section would seem to imply that notices and resolutions are to be published where there is a newspaper in which to publish them, and, when so published, posting becomes unnecessary, and that the posting referred to in the section is only required where no newspaper is published. If the contention of appellants is correct, and the resolution of intention is required to be posted in all cases, then, under section 34, it would be necessary to post it twice in those instances where there is no newspaper published or circulated in the city. We can scarcely conceive that this result was intended by the legislature, and are of opinion that under section 34 the notice or resolution in question, when duly published in the newspaper, was not required to be posted.

The assignment from plaintiff Gill to Ramsbottom and the reassignment by the latter to the former, as averred in the complaint, are sufficient to reinvest plaintiff with the right to collect, to the money collected, and to its incident—the

lien sought to be declared and enforced in this action. Hence, we are of opinion the demurrer was properly overruled.

It is next objected by appellants that the work provided for in the resolution of intention is not identical with that subsequently ordered done, while that included in the bid of plaintiff, and for which the contract was awarded to him, differs from both. The resolution of intention, among other things, provided for cross-walks laid at the intersection of Church, Sonora and Lafayette streets, culverts constructed at the east side of the intersection of Church street. The resolution ordering the work done called for cross-walks laid as follows: "One on each of the north, west, and south sides of the intersection of Church street, and one on each of the four sides of the intersection of Sonora street and Lafayette street, and a combined culvert and cross-walk on the east side of the intersection of Church street." The bid of plaintiff for the performance of the work included eleven new cross-walks and one culvert, but did not mention specially a combined cross-walk and culvert. The resolution ordering the work follows substantially the resolution of intention. The eleven cross-walks, and the combined culvert and cross-walk, so called—by which we understand a culvert, the top of which was to serve as a cross-walk—constitute the twelve cross-walks spoken of elsewhere, and involve a substantial specification, as in the resolution of intention and resolution for performance of work so required. It is conceded that, where the statute requires a series of acts to be performed before the owners of the property are properly chargeable with the tax, such acts are conditions precedent to the exercise of the power to levy the tax, and all the requirements of the statute must be complied with, or the tax cannot be collected. But, while this is admitted, it is a substantial compliance with the provisions of the law which is required; and, so that such substantial compliance is had, a mere want of technicality of expression or precision of statement which does not affect the essential object in view will not vitiate the proceedings. The award to the contractor by the city council seems to have been regular and in consonance with the resolution, and was the authority to the superintendent of streets, under which he, in his official capacity, entered into the contract; and the contract entered into between the su-

perintendent of streets and plaintiff was for the work described in the resolution ordering the work, which is deemed sufficient.

It is next contended that the plans and specifications introduced in evidence were not prepared by the order of, or under the direction of, the said council of the city, and were not authenticated as being the work of the city surveyor of said city, or under such direction, and were therefore improperly admitted in evidence. The specifications, as offered in evidence, are indorsed as follows: "Plans and specifications for grading, graveling, laying cross-walks and culvert on Aurora street, Nov. 25, 1889. Approved and adopted as submitted and read. [Signed] C. A. Campbell, City Clerk." The third section of the statute (Stats. 1889, p. 159) provides that "plans and specifications and careful estimates of the cost and expenses thereof shall be furnished to said city council, if required by it, by the city engineer of said city." G. A. Atherton, who was called as a witness on behalf of the plaintiff, testified that he was the city surveyor of the city of Stockton, and that he prepared the plans and specifications for this work. The statute does not, in terms, specify the mode by which the city surveyor or engineer shall be required to furnish the plans and specifications for work, nor does it, in terms, require such plans and specifications in all cases, but only "if required by it" (the city council). The fact that the plans and specifications were prepared by the city engineer, were on file, and were approved by the city council, is sufficient evidence of their authenticity.

The time for completion of work under the contract was extended by resolution of the city council, passed at a special meeting called for that purpose, at which meeting one member of the council, to wit, the president thereof, was not present. Notice of the meeting, specifying the time, place, and object thereof, was served upon each member of the board by the clerk, but such notice was not entered of record. Objection was made at the trial to proof of the service of the notice otherwise than by record evidence, and to the ruling of the court permitting such proof. Exception was taken, and the action of the court is assigned as error. The record of the meeting shows that all the members of the city council were present, except Lehe, the president, and that the resolu-

tion extending the time for plaintiff to perform his contract was adopted by the unanimous vote of all the members present. Under these circumstances there was no error in admitting the evidence of C. A. Campbell, clerk of the council, to prove that he served notice of the meeting, specifying the time of meeting, and the object thereof, upon each and every member of the city council: *San Luis Obispo County v. White*, 91 Cal. 432, 24 Pac. 864, and 27 Pac. 756.

The next point made by appellants relates to the record of the warrant which was recorded and issued to T. A. Gill, plaintiff herein, October 17, 1890, and under the law was to be returned and recorded within thirty days thereafter, and during which time the demand for the payment of assessments listed thereon is required to be made. The complaint avers the issuing and recording of the warrant, with the assessment and diagram attached, and their delivery to plaintiff, the demand thereafter of payment of the sum specified in the warrant as assessed against the lot in question, and that defendant has not paid any part thereof, and that thereafter, within thirty days from the date of said warrant, the same was duly returned to the said street superintendent, with the return indorsed thereon, verified by oath stating the name and character of the demand made, etc., as required by the statute; that thereupon the said street superintendent duly recorded the said return so made by the said warrant in the margin of the record of said warrant, etc. These allegations are not denied by the answer. It follows that the contention of appellants that the demand was made after the return of the warrant is one not in issue in the court below, and upon which no question could properly arise. There was, it is true, testimony introduced tending to show a mistake in the date of the filing of the return, and that, while it purported to have been filed and recorded on the day of its issue, such return was in fact recorded on November 15, 1890. This, however, was of no importance, for the reason, as before stated, there was no issue on that question.

The plaintiff herein, on January 15, 1890, assigned the contract for the performance of the work in question to Robert Ramsbottom. To show a retransfer from the latter

to plaintiff, a reassignment from Ramsbottom to plaintiff was offered in evidence, which, so far as material here, is in the following language: "I hereby assign to said T. A. Gill all my right and interest in and to the amounts assessed to S. Dunham, for street work, against lots 1, 3, 5, 13, 14, in block 259, east of Center street, in the city of Stockton, and all my right to collect the said amounts so assessed against said Dunham, and all my right to proceed against the said Dunham for the collection of said amounts." The introduction of this instrument in evidence was objected to by defendants upon the ground that it does not, upon its face, purport to be an assignment of any cause of action or right of lien against the property described herein, but simply a right to collect certain amounts assessed against said Dunham, and that there are no amounts assessed against said Dunham, and that his name does not appear in the official proceedings herein. Lot No. 1 in block No. 259, east of Center street, in said city of Stockton, referred to in the assignment, is the lot upon which the lien is sought to be foreclosed in this action. It was assessed to "unknown owner," and the name of S. Dunham does not appear in the assessment. It is averred, however, in the complaint, and admitted by the answer, that said Dunham was and is in fact the owner thereof. The name of S. Dunham may be treated as surplusage, and the assignment sufficiently identifies the claim or demand sought to be assigned in the instrument. It would then read as an assignment in and to the amounts assessed for street work against lot 1, etc., in block 259. As the only object is to identify the subject matter embraced within the assignment, the identification is sufficient, whether the name S. Dunham be retained or rejected. The lien was but an incident of the demand, and passed with its assignment.

The motion for nonsuit was properly denied. There was evidence tending to sustain, on the part of the plaintiff, all the issues in the case.

Upon the question of the fulfillment of the contract in the doing of the work, the testimony was conflicting, and the finding of the court, in consonance with the allegations of

the complaint, is amply supported by the evidence. The judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Vanelief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

HELSEL v. SEEGER.

No. 19,016; September 25, 1893.

34 Pac. 237.

Bill of Exceptions.—A Paper in the Transcript, Denominated a “bill of exceptions,” not certified by the clerk to be a correct copy of any bill of exceptions on file, and not containing any specific exceptions to any particular finding of the court, will not be considered by the supreme court.

APPEAL from Superior Court, Kern County; A. R. Conklin, Judge.

J. R. Haralson for appellant; Brundage & Flournoy for respondent.

DE HAVEN, J.—The findings are sufficient to sustain the judgment. The paper found in the transcript and denominated a “bill of exceptions” is not certified by the clerk to be a correct copy of any bill of exceptions on file, nor does it contain any specific exception to any particular finding of the court. Judgment affirmed.

We concur: Fitzgerald, J.; McFarland, J.

SMITH v. LOS ANGELES & PACIFIC RAILROAD
COMPANY.

No. 19,252; September 27, 1893.

34 Pac. 242.

Receiver—Void Order of Appointment.—Where an order appointing a receiver of a corporation is void, a judgment creditor of the corporation does not, by intervening in the action for the purpose of enforcing his judgment, waive all objections to the order, and thereby lose the right to levy on the corporate property.¹

A Void Order may be Attacked in any proceeding.

An Order Denying a Motion to Vacate a Void Order does not validate such void order.

APPEAL from Superior Court, Los Angeles County; J. W. McKinley, Judge.

Action by Smith against the Los Angeles and Pacific Railroad Company. An application for an order directing the sheriff to levy on sufficient property of defendant to satisfy a judgment theretofore obtained by plaintiff against defendant was denied and plaintiff appeals. Reversed.

T. L. Winder and Chapman & Hendrick for appellant; Anderson & Anderson for respondent.

PATERSON, J.—A receiver was appointed in the case of California Bank v. Los Angeles & Pacific R. R. Co. on September 13, 1889. On October 26, 1891, plaintiff herein filed a petition of intervention in that action, setting forth, among other things, that he had obtained a judgment against defendant herein for the sum of \$4,403.30 on October 2, 1891, and that no part thereof had been paid. He prayed that his claim

¹ Cited in *Grant v. Los Angeles etc. Ry. Co.*, 116 Cal. 72, 73, 47 Pac. 873, to the effect that the order of court was void, the same being involved in both cases.

Cited in *Grant v. Superior Court*, 106 Cal. 325, 39 Pac. 604, where the court, considering an application for a writ of prohibition, refers to it as decisive of the question of the particular order of court under discussion being void.

might be allowed against the corporation defendant, and that certain land belonging to the latter be sold and the proceeds of the sale be applied to the payment of the debts of the corporation in such proportion as the court should determine. On July 11, 1892, he applied to the court for an order discharging the receiver, on the ground that said order was void, the court having no jurisdiction to make the same. The application was denied, and thereafter he applied to this court for a writ of certiorari to review the proceedings. A hearing was had, and judgment was entered denying the petition on the ground that the petitioner had lost his right to the relief prayed for by reason of his delay in making the application: *Smith v. Superior Court*, 97 Cal. 348, 32 Pac. 322. Subsequently, plaintiff applied in this action to the court below for an order directing the sheriff to levy upon sufficient property of the defendant in the hands of the receiver to satisfy his judgment. The motion was denied, and from the order this appeal was taken. Respondent contends that the order should be affirmed for the following reasons: By intervening in the bank case, for the purpose of enforcing his judgment, the plaintiff became a party to that action, and has ratified and consented to the appointment of the receiver, thereby waiving all right to question the order by which said receiver was appointed; that this is a collateral attack upon the order appointing the receiver; and that, as between the appellant and the respondent, said order is *res adjudicata*.

1. It is doubtless true that one may so conduct himself as to be estopped from repudiating the action of a receiver, although the order by which the receiver was appointed is void. But in this case mutuality, which is one of the essential elements of estoppel, is wanting. The plaintiff herein could not, by simply intervening in the other case, receive any benefit, and no one, certainly, was prejudiced by his action therein. The receiver was not appointed upon his suggestion. If there be any act tending to validate the order appointing the receiver, such act is the act of the court and not of this plaintiff; but, as we shall see, the order was void. The action in which the receiver was appointed was brought against the corporation, the principal bondholders, and the trustee of the property mortgaged to secure payment of the bonds; but the clerk certifies that no summons appears among the files of

the case, and that no entry of the same appears upon his register of actions, and the record shows that on June 7, 1891, the action was dismissed as to some of the parties. Inasmuch, therefore, as it appears that the plaintiff therein cannot avail itself of the services of the receiver, to hold that the plaintiff is not entitled to an execution herein is to decide that he has no remedy whatever for the enforcement of his judgment. We do not think that his conduct in the action referred to would warrant any such conclusion. Certainly, the California Bank ought not to be permitted, after practically abandoning the action for all purposes, to put the creditors in such a position that they can obtain no relief, either through the receiver, or by the ordinary processes of law.

2. This is not a direct attack upon the order appointing the receiver, but, the order being void, it may be disregarded. If the order is absolutely void, it is a nullity, and can be attacked in any proceeding. That it is absolutely void was clearly demonstrated when the matter was before the court, in department, in *Smith v. Superior Court*, supra.

3. As to the proposition that the order appointing the receiver is *res adjudicata*, it is sufficient to say, we think, that a court cannot, by an order denying a motion to set aside a void order, give the latter any vitality. If the order is void, it is void—a mere nullity—and may be treated as nothing. The decision of this court in the certiorari proceeding did not affirm the order of the court below. It declared that order void. It is true the proceedings were dismissed, but laches is the ground upon which the decision went; and the question whether the conduct of the plaintiff, as intervener, estops him from denying the validity of the order appointing the receiver, was not determined.

The order appealed from is reversed.

We concur: De Haven, J.; Harrison, J.; McFarland, J.

REMY v. OLDS et al.

No. 18,114; September 28, 1893.

34 Pac. 216.

Actions.—A Cause of Action may be Stated in Different Counts in order to meet any possible phase of the evidence, and the pleader will not be required to elect on which count he will proceed.¹

Contract—Excuse for Nonperformance—Act of God.—Where plaintiff, in an action for breach of contract, must show performance on his part before he can recover, nonperformance by him cannot be excused on the ground that it was caused by the act of God; and Civil Code, section 1511, providing that want of performance is excused “when it is prevented or delayed by irresistible superhuman cause,” does not apply to such cases.²

Contract to Plant Grape Vines—Meaning of Words.—Where a contract requires a party to plant “grape vines,” and the word “vines” does not appear to have been used in any special or local sense, expert evidence is not admissible to show its meaning, but it will be held to mean indifferently either cuttings or rooted plants, according to common usage.

¹ **Cited** and followed in *Willard v. Carrigan*, 8 Ariz. 73, 68 Pac. 539, which was an action by a real estate broker for compensation for finding a purchaser. The complaint contained a count based on an alleged oral contract and another, in effect, on a quantum meruit.

Cited and approved in *Van Lue v. Wahrlich-Cornett Co.*, 12 Cal. App. 751, 108 Pac. 716, which was an action for the return of property seized by the sheriff, claimed by the plaintiff as exempt under the statute. The court said that a comparison of one section of the statute with another forced “the conclusion that a person cannot claim both a farmer’s and a teamster’s exemption.” They added, however, giving the citation as authority: “But we think it was competent for the plaintiff, being in doubt as to which exemption he was entitled to, to set forth both in his complaint, as was done in this case.”

² **Cited** in *Ontario etc. Assn. v. Cutting Fruit Packing Co.*, 134 Cal. 25, 86 Am. St. Rep. 231, 53 L. R. A. 681, 66 Pac. 30, the court saying there was nothing in it conflicting with the principles announced in the latter case. To quote: “In the case at bar, the sale having been of specific varieties of fruit, growing and to be grown on specific orchards, and the orchards having been so far affected by the extraordinary drought that they did not produce sufficient fruit of the varieties named to comply with the contract, the plaintiff could be compelled to perform the contract only so far as it was possible for it to do so.”

Contract to Furnish Water for Irrigation—Action for Breach.

In an action for breach of a contract to furnish water for irrigation, whereby a large number of grape cuttings planted by plaintiff died, testimony of a witness for defendants that he (witness) procured fifteen thousand cuttings from the lot from which plaintiff procured his, planted them on similar land, and watered and cared for them well, and yet nearly all of them died, though it relates to a collateral matter, is relevant, as tending to prove a fact from which it could be inferred that the loss of plaintiff's vines was not caused by defendants' failure to furnish water.¹

Contract—Action on—Sufficiency of Performance.—Where one of the issues in an action on a contract is as to whether there was such performance by plaintiff as would entitle him to recover, an instruction that, if the jury believe that defendants did not perform their part of the contract, they must find for plaintiff, is erroneous, as it takes from the jury the issue as to performance by plaintiff.

APPEAL from Superior Court, Merced County; Joseph H. Budd, Judge.

Action by Thophile Remy against E. J. Olds and George H. Barfield for breach of contract. There was a judgment in favor of plaintiff and defendants appeal. Reversed.

J. W. Knox for appellants; James F. Peck and T. C. Law for respondent.

TEMPLE, C.—Defendants take this appeal from the judgment and an order denying a new trial. This case has been here before: 88 Cal. 537, 26 Pac. 355. In the opinion on the

¹ Cited and distinguished from the case of a sale by sample where the goods were delivered in two shipments at a considerable interval and the action was only for payment for the last one. Here evidence that the goods first shipped were not equal to the sample was held not admissible in the absence of proof that they were similar in quality to the others.

Cited and approved in *Barber v. Martin*, 67 Neb. 452, 93 N. W. 724, an action by a stockholder against the manager of an insurance company, who, as the plaintiff alleged, had undertaken to sell her stock, but in reporting to her afterward had concealed from her the real price received. Here the evidence of other stockholders, similarly situated, as to representations of the manager to them as to sales of their stock was admitted as throwing light on the case.

first appeal the substance of the complaint and the contract sued on are fully stated. The answer denies the existence of the contract, but admits that such a contract was agreed upon, and avers that it was to have been reduced to writing and signed by all parties; that it was reduced to writing, signed and acknowledged by defendants, and sent to plaintiff, who was to sign, acknowledge, and have it recorded. This was October 9, 1888. It appears that plaintiff did not then sign it, but had it recorded. Afterward, on being informed that his signature was necessary, he did sign it, and had it re-recorded. Meantime he had taken possession of the land and commenced performance. Defendants consented to his acts, believing that he had signed the contract, but, discovering that he had not done so, they notified him in writing in June, 1889, that they would not be bound by it, and considered him a trespasser on the land. Apparently, however, although that is not made very certain by the evidence, the plaintiff had executed it before the notice was given. Upon receiving the notice plaintiff withdrew from the land and commenced this action.

The complaint, as was said on the former appeal, contains two counts—one for damages on the contract, and the other to recover materials furnished, money laid out and expended, and labor performed, all furnished and done under the contract, and in performance of it, before the notice from defendants. After a jury had been impaneled, defendants requested the court to require plaintiff to elect upon which count or cause of action he would rely, and that thereupon the other cause of action be dismissed. This the court refused to do, and the ruling is assigned as error. Conceding that this is a case in which the same cause of action is differently stated in two separate counts, still I think the ruling correct. The right to so plead is well established here: *Wilson v. Smith*, 61 Cal. 209; *Katz v. Bedford*, 77 Cal. 319, 1 L. R. A. 826, 19 Pac. 523; *Leeke v. Hancock*, 76 Cal. 127, 17 Pac. 937; and many earlier cases. Since it is allowable to state the cause of action in the alternate, using different counts in order to meet any possible phase of the evidence, a party cannot be deprived of the privilege by being compelled to strike out all causes of action save one before the trial commences. It would render the privilege a barren one. But the two causes

of action here are not the same. The second count only enumerates other damage, not specially set out in the first count. Perhaps all should have been in the one count, but there can be no doubt of the right of plaintiff to join all in one suit, and he cannot be compelled to abandon any part of his claim.

The next point relates to the ruling admitting the contract in evidence on the ground that it had not been executed by plaintiff. The facts in regard to this have already been stated. This ruling was clearly correct. It is convenient to refer to the concise statement of the provisions of the contract in the opinion rendered on the last appeal. Plaintiff did not level and prepare the land in the fall of 1888, but claims that he did in the following February, and in March he set out grape cuttings upon lots 49 and 50, and also a nursery of about four acres for himself on lots 71 and 72. The vines nearly all died, as plaintiff maintains, because defendants did not furnish water for irrigation. Plaintiff seeks to recover as damages the cost of the cuttings and his labor in preparing the land and planting. To this claim on the part of plaintiff the defendants interpose several objections. (1) They contend that he cannot recover damages in a suit upon the contract because he has himself failed to perform his obligations under it, in that he did not plow, level, or prepare the land for planting in the fall of 1888. They contend and produce evidence in support of the proposition that, unless the land were plowed in the fall before the rains, it would not be in good condition for planting in the following spring. (2) That the vines were not properly planted, and would not have survived if water had been furnished. (3) That the vines, when planted, were not protected by a rabbit-tight inclosure, and that the rabbits gnawed the bark from the cuttings, and nibbled the buds, and prevented their growing. There was no evidence that rabbits did injure the vines, but there was that rabbits were very numerous there, and that protection against them was necessary to enable vines to grow as soon as planted. And (4) the cuttings were dead, or at least not suitable for the purpose when planted. Defendants also contend that they did furnish water as soon as it was required; if not on Hartley avenue, still, where it was equally convenient, and where plaintiff had consented to receive it. It was incumbent upon the

plaintiff, since he seeks to recover upon the contract, to show full performance on his part, so far as he was not prevented from performing by defendants. He did not claim that he had plowed, leveled, or prepared the land in the fall, but he contended that the provision as to time was waived by defendants, and that they consented to his doing this work in February; also that the delay was excused because performance at the time was prevented by act of God, to wit, a heavy storm or fall of rain, which rendered the land unfit to be plowed in the fall.

Defendants objected to the evidence, (1) because the complaint avers that plaintiff had performed the contract as made and does not show an alteration; (2) in effect, though not so stated, because the act of God would not excuse delay. As to the first, it is enough to say that the position of plaintiff does not assume that there had been any alteration of the contract, but that the defendants agreed to accept what was done as performance. The contract as made was fully performed, if plaintiff is correct, though not at the time stipulated. But, regarding it as an alteration of the contract, it is evident that defendants have not been injured. As to the ruling permitting evidence that it was impossible to plow, level, and prepare the land in the fall of 1888, further consideration is necessary. The jury were also instructed upon this matter, and all may as well be considered together. Plaintiff, testifying in his own behalf, was proceeding to state that he attempted to plow, level, and prepare the land in October, when the rains came, and he could do no more. Defendants here objected that it was immaterial whether the rain rendered it impossible or not, when the court remarked, in the presence of the jury: "I would like to see the decision that, where the act of God prevents a man, because of that act of God he shall lose all of the results of his labor. Objection overruled." Upon the conclusion of the evidence, the jury was instructed as follows: "Time is of the essence of the contract in controversy in this action. This means that, unless every act meant to be done under the contract is done within the time therein stipulated, there is a breach of the contract by which-ever party fails so to perform, unless the time in which the act is to be done be waived, or such performance be impossible by the act of God, such as an unexpected storm." The first

idea which suggests itself upon this matter is that a rain in the last days of October is not such an extraordinary event as will constitute an act of God excusing performance. It was a seasonable event, one which was likely to happen, and which common prudence would have provided for. Respondent, however, contends that this view is justified by section 1511, Civil Code. That is, in effect, that want of performance "or any delay therein is excused by the following causes to the extent to which they operate. . . . (2) When it is prevented or delayed by an irresistible superhuman cause," etc. I cannot think this section was intended to have any application to a case of this kind. The doctrine in relation to the act of God is more often invoked by insurers than by others, but is in a proper case matter of defense, where one is sued for failure to perform a contract. When, however, one sues upon a contract, and must show performance on his part to entitle him to recover, he cannot rely upon such prevention to show performance. Excuse for not performing, in the nature of things, cannot be performance. A defendant cannot be made to pay for the act of God preventing the plaintiff from rendering an equivalent for the money he seeks to recover. The provision cited from section 1511 cannot be construed as going beyond this. Properly understood, it announces a well-known rule of law, but pressed further it works a radical change in the rule. Besides, the view here taken is the natural and obvious meaning of the language employed. The statute purports simply to provide an excuse for failure to perform. Plaintiff might have relied entirely upon his claim that defendants had waived the matter of time, but did not. Under the circumstances, it is impossible to say that this evidence and the instruction did not have weight in convincing the jury that plaintiff was not in default when the notice was served: See Civ. Code, sec. 1440.

Plaintiff set out on lots 49 and 50 grape cuttings or segments of grape vines, instead of rooted vines. Defendants contend that this was not a compliance with the contract, which calls for grape vines. They insist that a vine includes the root—is an entire plant. Upon this subject expert testimony was admitted. It was also shown that vineyards were sometimes planted with cuttings and sometimes with rooted vines. Some witnesses thought the words "grape vines" necessarily meant

a rooted vine, and some that it excluded the idea that the vine was rooted. The dictionaries give as the first meaning of the word "vine" a plant with a trailing or climbing stem; but they also apply the word to the trailing stem in contradistinction to the plant, and we all know that the word is so applied in common usage. As the words "grape vine" might mean either, and both are used in planting vineyards, I think plaintiff was at liberty under his contract to use either. It was proper to show how vineyards are planted, but, since the words were not used in any special or local sense, I think the meaning of the words was not a matter to be established by expert testimony.

Appellant complains of an order of the court striking out certain evidence given by Mitchell, a witness for defendants. The witness had stated that he procured some fifteen thousand cuttings from the lot from which plaintiff obtained his; that he set them out on land similar to lots 49 and 50 and in the vicinity; that his were well watered and cared for, and yet nearly all died; and was proceeding to specify the character and degree of care given them, when he was interrupted by the court, who ordered the testimony stricken out, and instructed the jury not to regard it, saying that it was in regard to a matter entirely collateral, and had no bearing on the case. Counsel for the defense then stated that he had other testimony to the same point which he asked might be considered as offered, excluded, and exception noted. This was agreed to. That the evidence was upon a collateral issue is not conclusive against its relevancy. The question was whether the fact it tended to establish would tend to prove or disprove the fact at issue. Evidence is relevant not only when it tends to prove or disprove the precise fact in issue, but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can be directly inferred. I think the evidence was relevant and material. Plaintiff claimed that his vines died for lack of water which defendants agreed to furnish, but did not. The evidence excluded tended to show that the vines would not have lived had water been furnished. If this were established, plaintiff could not recover the cost of vines set in lots 49 and 50, nor for his labor in setting them, nor damages for the loss of his nursery, which he claims he would have made had he been permitted

to complete his contract. The probative force of the evidence was for the jury. Plaintiff was to furnish the grape vines.

The question as to the necessity for a rabbit-tight fence was probably sufficiently discussed on the former appeal. Of course, the rule is well established that in construing a contract a court is not only to take it by all its corners, but is to be placed in the seats of the parties when it was made. In other words, it is to be construed in the light and with the knowledge of surrounding circumstances. If circumstances were shown at the trial which did not appear in the complaint, in the light of which the court construed the contract on the former appeal, and which would justify a different construction, that ruling would not then constitute the law of the case. The court should now interpret the contract in the light of all the facts, and, so far as other facts throw light upon it, the court is not bound by the ruling based upon the allegations of the complaint in overruling the demurrer.

I think the court erred in its ruling in regard to evidence that a fall plowing of the land was necessary. The ruling and remark of the court went beyond the necessities of the case, and amounted to an instruction to the jury that plaintiff was entitled to a judgment unless defendants furnished water on Hartley avenue. The court said: "I will instruct the jury, if the defendants did not furnish water on Hartley avenue according to the contract, the plaintiff is entitled to damage for a breach of the contract. You will direct your evidence to that point." This took from the jury at once all consideration of the question as to whether plaintiff had failed to perform the conditions of the contract on his part. Indeed, the ruling prevented defendants from putting in proof upon the subject of the claim that plaintiff did not plow, level, or prepare the land in 1888, or to rebut evidence on the part of plaintiff that they had waived such performance. It also ignored the evidence given by defendant Olds to the effect that plaintiff had consented to the furnishing of water on Clinton avenue.

It is fair to say that the formal instructions do submit to the jury the question as to whether plaintiff was in default when the notice was served. The remark was not intended to have any bearing upon that question. Still apparently it did, and we cannot say that it did no injury to defendants.

Some further questions are raised, but I think none which need discussion here. I think the order and judgment must be reversed and a new trial had.

I concur: Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and a new trial ordered.

PEOPLE v. DANIELS.

No. 20,980; September 28, 1893.

34 Pac. 233.

Arson.—On a Trial for Arson an Instruction that “Malice, within the meaning of the law, includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive,” is correct, Penal Code, section 7, subdivision 4, providing that “the words ‘malice’ and ‘maliciously’ import a wish to vex, annoy or injure another person, or an intent to do a wrongful act.”¹

Arson.—An Instruction that, “Where the Evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been,” is correct.

APPEAL from Superior Court, Los Angeles County; B. N. Smith, Judge.

R. Daniels was convicted of arson in the second degree, and appeals. Affirmed.

C. C. Stephens for appellant; Attorney General Hart for the people.

BELCHER, C.—The defendant was convicted of the crime of arson in the second degree, and has appealed from the

¹ Cited in the note in 38 L. R. A., N. S., 1061, on malice aforethought in homicide.

judgment and from an order denying his motion for a new trial. The only grounds urged for a reversal are that the court erred in giving to the jury portions of two instructions asked by the people, and in its rulings upon the admissibility of certain evidence. It was proved that the defendant was present at the time and place of the fire, but otherwise the evidence against him was entirely circumstantial. The court instructed the jury, in the language of the Penal Code, that arson is the willful and malicious burning of a building with intent to destroy it, and that the offense is divided into two degrees, etc. It next gave an instruction to the effect that, to constitute the offense charged, the intent alleged in the information must be proved, but direct and positive testimony is not necessary to prove it. It may be inferred from the evidence if there are any facts proved which satisfy the jury beyond a reasonable doubt of its existence. Then follows the clause first objected to, in these words: "The court instructs the jury that malice, within the meaning of the law, includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive." The only criticism of the instruction is that "the definition of malice is fatally incorrect," but in what respect it is incorrect is not stated, nor are any authorities cited. The Penal Code defines "malice" and "maliciously" as follows: "The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law": Sec. 7, subd. 4. In the connection in which they are used, the phrases "an intent to do a wrongful act" and "every other unlawful and unjustifiable motive" must be held, in our opinion, to mean substantially the same thing. There was therefore no prejudicial error in the words complained of.

The court also instructed the jury in regard to direct and circumstantial evidence in the language used and approved in *People v. Morrow*, 60 Cal. 142. Then followed the part of the instruction secondly objected to, in these words: "Where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-

witnesses would have been.' It is claimed that the court erred in giving this instruction, but here, again, no particular error is pointed out and no authorities are cited. The language quoted is copied from the opinion delivered by Mr. Justice Sanderson in *People v. Cronin*, 34 Cal. 202, and, so far as we are advised, it has never been overruled or questioned. It must be held, therefore, that the instruction stated the law correctly. The points in regard to the admissibility of evidence are made by simply calling attention to certain folios in the transcript, where the rulings and exceptions are to be found. This way of presenting a case in this court is not very satisfactory, but we have examined the folios referred to, and fail to see any material error in any of the rulings. The judgment and order should be affirmed.

We concur: Searls, C.; Vancief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

BRADLEY et al. v. PARKER.

No. 18,141; September 28, 1893.

34 Pac. 234.

Trial.—Where a Finding on One of the Issues involved is determinative of the case against plaintiffs, the failure of the court to find on defendant's plea of the statute of limitations as to one of the plaintiffs is not prejudicial to such plaintiff.

Pleading—Amendments.—Where the Complaint in an action for conversion describes plaintiffs as heirs of one B., which is merely matter of inducement, an amendment will not be allowed, after trial, so as to count on plaintiffs' rights, as heirs of B., whose estate had not been administered on or distributed, to sue for conversion of property of which they had never been in possession, and which defendant had received under a contract to which plaintiffs were not parties, as such amendment would raise new issues, which would probably require a new trial.

APPEAL from Superior Court, Tulare County; William W. Cross, Judge.

Action by James S. Bradley, Helen Travers and Edwin Bradley against B. G. Parker to enforce a trust. There was a judgment in favor of defendant, and plaintiff James S. Bradley appeals. Affirmed.

E. O. Larkins and Chas. G. Lamberson for appellant; Bradley & Farnsworth for respondent.

SEARLS, C.—This action was brought to enforce a trust against the defendant on account of certain sheep received by him to be kept for the plaintiffs. Defendant had judgment, from which, and from an order denying a motion for a new trial, James S. Bradley, one of the plaintiffs, appeals.

According to the amended complaint, one James H. Bradley died intestate, in the county of Tulare, August 4, 1870, leaving an estate consisting of real and personal property, among the latter of which was fifteen hundred head of sheep. His heirs were Margaret Bradley, his widow, and the plaintiffs herein, who are their children, all of whom were minors at the date of their father's death. At the time of the commencement of this suit, appellant was of the age of twenty-one years, and the other plaintiffs were aged twenty-three years and twenty-six years, respectively. No administration was ever had on the estate of James H. Bradley. About 1877, Margaret Bradley, the widow and mother of plaintiffs, entered into an agreement with defendant, whereby the latter was to take charge of said sheep for said plaintiffs, in trust for them, to render an account of the issues and profits, and to account for all the increase. Defendant took the sheep to Utah about 1878, and, contrary to his trust, traded some of the sheep for cattle, sold some to pay his own debts, sold the remainder, as well as the cattle, and retained the money, and mingled it with his own, and since 1878 has enjoyed the profit thereon, without right, etc. The complaint further avers that, before the trust agreement was entered into, Margaret Bradley had taken possession of certain of the property of the estate, and had given her interest in the sheep to plaintiffs, whereby it is alleged they became the

legal owners thereof. Defendant is averred to have received for the sheep \$2,000, which, with the accumulations since 1878, now amounts to \$4,000, which sum plaintiffs pray be declared a trust fund, and defendant be decreed to pay with interest, and that he account, etc. It is also alleged that the defendant has never disavowed the trust. The complaint is not verified. The answer denies all the material allegations of the complaint, and pleads the statute of limitations. The cause was tried by the court without a jury, and written findings filed, upon which the judgment was entered. The findings of the court negative all the allegations of the amended complaint charging the existence of a trust relation between defendant and the plaintiffs. The court then proceeds to find that October 1, 1876, Margaret Bradley, the mother of plaintiffs, had in her possession about six hundred and fifty sheep, in poor condition, which she let to defendant for one year; the latter to care for them for one year, and each to have one-half the wool and increase. The winter of 1876-77 was very dry, and in the spring of 1877 feed failed, and defendant, having seven thousand sheep of his own, was compelled to move them, in quest of food. Defendant requested Margaret Bradley to take charge of her sheep, which she did not desire to do; and thereupon a new agreement was made, by which defendant was to take the Bradley sheep with his own, pay himself for the expenses and trouble of their care, and, if anything was left, to pay it to Mrs. Bradley. Defendant started with the sheep for Utah, having in all seven thousand eight hundred, of which all died on the road except three thousand one hundred. The Bradley sheep being very poor, a greater proportion of them died than those of defendant. Defendant sold \$200 worth of sheep to pay expenses, among which were some ten to twenty of the Bradley sheep, worth \$2 per head. Defendant traded off all the remainder of the sheep—among them, about one hundred and twenty-five head left of the Bradley sheep, worth \$2 per head—for one hundred and eighty head of cattle, which he afterward sold for \$20 per head, but did not receive the money therefor, the same having been garnished under a writ of attachment against defendant, in favor of the Bank of Visalia, for moneys advanced to defendant, and by him expended in taking the sheep to Utah. The six hundred and

fifty head of sheep belonged to the estate of James H. Bradley, deceased, although defendant was not aware of that fact, he supposing the estate had been closed, and that the sheep belonged exclusively to Margaret Bradley, the widow. The court found against the averment that the sheep had been given to the plaintiffs. The court also found, upon the plea of the statute of limitations, in favor of defendant, and against all the plaintiffs except James S. Bradley. The agreements were both oral. The findings are lengthy and explicit. The foregoing is but a synopsis of them.

It is objected that the court failed to find upon the plea of the statute of limitations as to the plaintiff James S. Bradley. This was of no consequence. The issues upon which the court passed were determinative of plaintiffs' right to recover; and, as a judgment against James S. Bradley necessarily followed those findings, it could not in the least have benefited him had a finding been entered in his favor on that issue: *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557; *Johnson v. Vance*, 86 Cal. 130, 24 Pac. 863; *Dyer v. Brogan*, 70 Cal. 136, 11 Pac. 589; *McCourtney v. Fortune*, 57 Cal. 617; *Porter v. Woodward*, 57 Cal. 535; *Murphy v. Bennett*, 68 Cal. 530, 9 Pac. 738.

Appellant also contends that, although the plaintiffs failed to establish the trust upon which they counted in their complaint, still, as they were entitled to any relief embraced within the issues, plaintiff James S. Bradley was entitled to recover such pro rata of the proceeds from the sale of the sheep belonging to the estate of James H. Bradley, deceased, as the evidence showed him entitled to. Appellant does not attempt to show us what particular sum of money or pro rata share thereof James S. Bradley was entitled to recover. In the light of the new agreement entered into between Mrs. Bradley and defendant before the latter left with the sheep for Utah, and of the fact that all the proceeds arising from the sale of the entire lot of sheep went to pay the expenses incurred, it is not perceived that anything was left to go to the plaintiff designated.

After the trial and before judgment was entered, the plaintiffs asked leave to file a second amended complaint, making Margaret E. Bradley, the mother of plaintiffs, a coplaintiff, and setting out an entirely new cause of action. The court refused leave to so amend, and the action is assigned as

error. The question of amendments to pleadings is one in which much must be left to the discretion of the *nisi prius* court, and it is only where there is an abuse of such discretion that this court will reverse its action. In furtherance of justice the courts of this state have gone further, probably, in permitting amendments than in those of any other jurisdiction within the Union. In New York, it is said, the real limitation seems to be that the amendment shall not bring a new cause of action: *Reeder v. Sayre*, 70 N. Y. 190, 26 Am. Rep. 567. In *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673, the court below, during the trial, permitted plaintiff to amend the prayer of a complaint which originally demanded a money judgment so as to include a demand for an accounting and for general relief, thus virtually changing the cause of action from one at law to recover money to an equitable action, and this court sustained its action. It is highly probable that in that and other cases of like import, had the court below refused leave to amend, this court would not have deemed it proper to say the courts have abused the discretion confided to them. Be that as it may, the present case does not fall within any rule calling for a reversal for the reasons indicated. Here the proffered second amended complaint came after the trial had closed, and, while it purported to be an amendment "to correspond to the facts as proven by the testimony in the case," it in fact raised new issues, calling for an answer from the defendant, and which would, in all probability, have required a new trial of the cause. The complaint upon which the action was tried rested upon the trust relation created by contract with defendant for the benefit of plaintiffs—a relation in which defendant was a trustee, and plaintiffs the beneficiaries. It is true, they were described as the heirs of James H. Bradley, deceased. This was merely matter of inducement, and not material. The proffered amended complaint counted upon their rights, as heirs of said James H. Bradley, to the property, and their rights, as such heirs, to maintain an action for the conversion of personal property received under a contract to which they were not parties, which had never been in their possession, and which belonged to an estate upon which no administration had been had and in which no distribution is averred. These questions have not, so far as we are aware, been de-

cided in this state; questions upon which, in the absence of statutory provisions, much discussion has occurred elsewhere, resulting in a diversity of opinion; questions which should not be determined lightly, and without a full opportunity for a hearing pro and con. Under such circumstances, there was no abuse of discretion on the part of the learned court in refusing leave to amend.

The attack upon the third finding of the court is without merit. That finding is to the effect that "all the allegations of paragraph 3 of said plaintiffs' amended complaint are untrue." It then goes on to find that defendant did not agree to take the sheep in trust for plaintiffs, that he never held them in trust, that he never detained or disposed of them in violation of any trust, etc., and then adds, "on the contrary, the facts are as follows," whereupon the whole history of the contract with Margaret Bradley, in relation to the sheep, and what was done with them and the proceeds, are fully set out. The contention of the appellant is that many of the allegations of the third paragraph of the complaint are concededly true; hence, that portion of the finding which we have quoted is erroneous. From a legal standpoint, and in the view which the court took of the testimony, the allegations are not true. The gravamen of the charges is that, pursuant to an agreement, defendant received certain sheep as a trustee of plaintiffs; that, contrary to said trust, he disposed of the sheep and received the money therefor, etc. In this view, the allegations were untrue, and the finding illustrates the transaction clearly by first stating the untruth, and then setting out succinctly the whole transaction. Instead of being subject to criticism, the finding, taken as a whole, affords an example which it would be well for courts to follow more frequently.

The other objections to the findings are not more cogent than those mentioned, and need not be further considered. The evidence was contradictory upon all the material issues. Upon a review of the whole case, we are of opinion the judgment and order appealed from should be affirmed.

We concur: Vanciel, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

FREEMAN v. GRISWOLD.

No. 19,157; October 4, 1893.

34 Pac. 327.

Vendor and Vendee.—A Covenant in an Agreement to Convey land, which provides that on noncompliance by the purchasers with the terms as to payment the seller shall be free from any obligation to convey, and the purchasers shall forfeit all right thereto, time being made of the essence of the contract, authorizes the seller to avoid the contract or not, at his option, and he is not bound to tender a deed except on payment of the price.

Vendor and Vendee.—Where a Land Contract Provides That, on Noncompliance by the purchaser with the terms as to deferred payments, the seller shall be free from any obligation to convey, and the purchaser shall forfeit all rights thereunder, except a right to occupy the premises as a tenant of the seller so long as the sums paid are equivalent to an annual rent equal to twelve per cent per annum of the price agreed on, with the right to purchase during such time, the seller, by bringing an action to recover the unpaid price, waives his right to treat the agreement to convey as void, and hence this clause, giving a right of occupancy for a certain time to the purchaser, which was to apply only in case of forfeiture, has no application.

APPEAL from Superior Court, Los Angeles County;
Walter Van Dyke, Judge.

Action by Daniel Freeman against Daniel Griswold. From a judgment for plaintiff, defendant appeals. Affirmed.

J. R. Dupuy, E. H. Bentley and R. Dunnigan for appellant;
Henry Bleecker and Geo. I. Cochran for respondent.

SEARLS, C.—This is an action on a written contract entered into between the assignor of plaintiff and defendant for the sale and purchase of real estate, and is brought to recover a balance of \$5,863.24 on account of the purchase price, and interest from August 2, 1887, at ten per cent per annum. Plaintiff had judgment, from which, and from an order denying a motion for a new trial, defendant prosecutes this appeal.

By the agreement which was entered into on the second day

of August, 1887, R. F. Lotspeich, trustee, agreed to sell, and defendant, Daniel Griswold, agreed to buy, certain lots of land situate in the county of Los Angeles, at specified prices per acre, the purchase price of which amounted in the aggregate to \$8,194.90. Of the purchase price defendant paid \$2,331.66 at the execution of the agreement, and agreed to pay a like sum at the expiration of six months, and the residue at the end of one year from the date of the agreement, with interest at ten per centum per annum. That portion of the agreement which gives rise to the principal contention here follows, and is in the following language: "In the event of a failure to comply with the terms hereof by the said party of the second part, the said party of the first part shall be released from all obligation in law or equity to convey said property, and said party of the second part shall forfeit all right thereto, except a right to occupy such premises as a tenant of party of the first part so long as the sums paid are equivalent to an annual rent equal to twelve per cent per annum of the purchase price agreed on, and party of the second part shall have the right to purchase at any time during the continuance of said rental at original price and twelve per cent interest. And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, agrees to execute and deliver to said party of the second part, or to his assigns, a good and sufficient deed in form of grant, bargain and sale. Time is the essence of this contract, and it is understood that the stipulations aforesaid apply to and bind the heirs, executors, administrators and assigns of the respective parties." No payments have been made upon the contract except the \$2,331.66 paid at the date of its execution.

According to the complaint and findings of the court, defendant asked for and received from Lotspeich an extension of time for payment of the residue of the purchase price until on or about December 10, 1889, when defendant refused to pay then or at any time, repudiated the contract, and declared himself no longer bound thereby. January 4, 1890, Lotspeich transferred, assigned, and conveyed the land and his interest in the agreement to the plaintiff herein. At the trial it was stipulated "that the contract set out in the complaint was admitted, and the assignment as set out in the complaint was

admitted, and the sole issue was stipulated to be as to the extension of time and waiver, as set out in the complaint." The cause was tried January 27, 1891. It is highly probable, judging from the foregoing stipulation, that the defendant at the trial sought to bring himself within the purview of the rule enunciated in *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280, to the effect that where time is made the essence of a contract for the sale of land, which contract provides for the execution of a deed at a given day upon the payment of a certain sum of money, and also provides for a forfeiture, and that in the event of a failure by the purchaser to comply with the terms of the contract the seller shall be released from all obligations to convey, and the purchaser shall forfeit all right thereto, then, and in such a case, the covenants to convey and to make payment are mutual and dependent, and, if neither party tenders performance on his part, or demands performance from the other on the day fixed, the contract is at an end, and cannot thereafter be enforced by either party. The covenants and agreements in the case at bar are, in effect, precisely similar to those set out in the agreement in *Cleary v. Folger*, supra, except as to the proviso here that the purchaser might become a tenant of the seller, and might subsequently purchase at the same price, but with an added rate of interest. *Cleary v. Folger*, so far as it held that in the absence of payment by the purchaser the seller was bound to tender a deed on the precise day named in the contract, and that, failing to do so, he could not thereafter, upon tender of a deed, recover the purchase money remaining unpaid, was not in conformity with the law as previously declared in like cases, and was to the extent indicated directly overruled in the later case of *Newton v. Hull*, 90 Cal. 487, 27 Pac. 429, decided after the case at bar was tried, upon an opinion concurred in by a majority of the commissioners who participated in the opinion in *Cleary v. Folger*. We must hold here, as was held in *Newton v. Hull*, supra, and in *Wilcoxson v. Stitt*, 65 Cal. 596, 52 Am. Rep. 310, 4 Pac. 629, as well as many others that might be cited, that a covenant in an agreement to convey land which provides that, in the event of a failure to comply by the purchasers with the terms as to payment, the seller shall be released from all obligations in law or equity to convey the land, and the purchaser shall for-

feit all right thereto, time being made of the essence of the contract, is a covenant for the benefit of the vendor, and must be construed as authorizing him to avoid the contract or not, at his option, and does not authorize the vendee to take advantage of his own neglect in making payment and avoid such contract. It may be said here as was said in *Newton v. Hull*, supra: There is no provision in the agreement that the plaintiff should forfeit his right to the purchase money in case the defendant should fail to pay it on or before the day on which it became due, nor in case he failed to tender a deed on that day, or at any time before the defendant tendered payment of the purchase money. Plaintiff was not bound to tender a deed, except upon a tender of the purchase money: *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *Wilcoxson v. Stitt*, supra. Plaintiff could only be put in default by a tender of the purchase money and failure to deliver a deed, and as there is no claim that any such tender of purchase money was ever made we are bound to conclude that the plaintiff is entitled to recover under the contract, unless inhibited therefrom by the exception contained therein, which provides that upon a failure, etc., the party of the second part shall forfeit all right thereto (to the property), except a right to occupy the premises as a tenant of the party of the first part so long as the sums paid are equivalent to an annual rent of twelve per cent per annum of the purchase price agreed to be paid, with the right on his part to purchase the land at any time during such tenancy at the price originally agreed upon, with interest thereon at twelve per cent per annum. This clause is certainly peculiar. So far as we know, it is *sui generis*, and is probably an outgrowth of the boom period in which it originated. Twelve per cent per annum on \$8,194.90, the purchase price, would amount to \$983.38 per annum, according to which calculation defendant would have been entitled to hold as a tenant, with the privilege of purchasing, for say twenty-eight months. A careful examination of this clause in connection with the provision of forfeiture of which it is a part, and to which it is an exception, leads to the following conclusions:

1. If defendant failed to make payment of the purchase money as called for by the agreement, his vendor was at liberty

to declare a forfeiture, refuse a conveyance and retain the money already paid.

2. If the vendor declared such forfeiture, and refused a conveyance, defendant had a right, although he had not paid in full, to enter as a tenant, and to purchase, as hereinbefore specified.

3. If the vendor waived a forfeiture, as under a covenant for his own benefit he might well do, the exception, which only applied in case of forfeiture, had no application.

4. The vendor, by bringing an action to recover the purchase money remaining due and unpaid, waived his right under the contract to treat his agreement to convey as null and void, and hence the exception, which only applied in case of forfeiture, had no application.

If we are in error in these views of the force and effect of the contract, it still remains to be said that, the exception in the clause providing for a forfeiture being for the benefit of defendant, and in the nature of an option, he was at liberty to avail himself of or to reject it, at his pleasure. According to the complaint and findings, which are supported by the testimony, he did repudiate the contract, and there is not in his answer or in the testimony any suggestion that he ever entered into possession as a tenant of his vendor, or claimed any right or evinced any desire so to do. It follows from these views that the demurrer to the amended complaint was properly overruled, and that the contentions of appellant upon the same questions as presented at the trial by numerous exceptions cannot be maintained. The assignment to plaintiff is averred in the complaint and not denied by the answer. There was evidence in support of the findings, and it can serve no useful purpose to refer to them in detail. The judgment and order appealed from should be affirmed.

We concur: Vanelief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

ADAIR v. WHITE et al.

No. 19,117; October 5, 1893.

34 Pac. 338.

Boundaries.—On the Question of the Location of a Point called for in a patent and survey, the court may consider the field-notes and description in the patent of an adjoining tract, the boundaries of the two tracts being coincident for a distance of several miles, and both having been surveyed by the same surveyor at about the same time.

Boundaries—Appeal.—On the Question of the Proper Location of a point called for in a survey and patent, a finding by the court on conflicting evidence will not be disturbed on appeal.

APPEAL from Superior Court, Ventura County; W. B. Cope, Judge.

Action of ejectment by George M. Adair against Frank W. White and others. From a judgment for defendants, plaintiff appeals. Affirmed.

W. H. Wilde for appellant; Blackstock & Shepherd for respondents.

HARRISON, J.—Ejectment for certain lands claimed to be a part of the Rancho Santa Paula y Saticoy, in Ventura county. The controlling question in the case is the location of the southerly line of the rancho. This line is set forth in the patent as follows: After leaving station S. P. 13, “thence S. 42, $\frac{1}{4}$ E., at 30 links enters bed of Santa Clara river, course S. W.; at 4 chains, intersects offset of township line in township 3 N., range 21 W., 39.50 chains east of corner to sections 10, 11, 14, and 15; at four chains and fifty links crosses river, and ascends; thence, along westerly slope of abrupt hills called ‘Lomas de Santa Paula,’ 492 chains, to stake marked ‘S. P. 14’ station, at the most southern point of above-named hills, known as the ‘Punta de la Loma.’ ” When the case was here upon the former appeal (Adair v. White, 85 Cal. 316, 24 Pac. 663) it was said: “It will be observed that this line terminates at the most southern point of the hills called the ‘Lomas de Santa Paula,’ which point is known as the ‘Punta

de la Loma.' This is the natural object or monument, and the station S. P. 14 was there fixed and established by the calls of the patent. If this point can be found, it is only necessary to run a line from S. P. 13 to S. P. 14 to fix the southern boundary''; and the case was remanded for a new trial in accordance with this principle. When the cause came on again for trial in the court below, the greater portion of the testimony was directed to establishing the location of the point upon the Punta de la Loma at which S. P. 14 had been placed, and from the evidence before it the court found that this point was so located that a line drawn from it to S. P. 13 lay to the north of the lands occupied by the defendants, and thereupon rendered judgment in their favor. The position of station S. P. 14, as well as the significance of "Punta de la Loma," were questions of fact to be determined by the court from the evidence before it. There was a sharp conflict of evidence upon both of these questions, and, under the well-established rule, the finding of the trial court thereon must be held conclusive. It is only where there is no substantial evidence in support of a finding that this court can disregard the finding of the trial court; and after a careful examination of the record herein we are unable to say that the evidence before that court did not authorize it to make the findings which it has made upon both of these questions of fact. The stake that had been placed at the station had disappeared, and one of the objects at the trial was to re-establish this monument. Several surveyors were called as witnesses for the respective parties for the purpose of establishing the location of S. P. 14, and the conflict between their testimony arises chiefly from the construction given to the field-notes and calls of the patent; the plaintiff contending that these notes call for the southernmost point of the Punta, or extremity of the hills, while the defendants contend that the Punta is itself designated as the southern extremity of the Lomas, or hills, and that the question to be determined was the position on the Punta at which the station S. P. 14 was originally placed. In his field-notes of the survey, which were finally approved for the issuance of the patent, the surveyor describes the course from S. P. 13 as running in a direct line "along western slope of abrupt hills called 'Lomas de Santa Paula,' 492 chains, and to the most southern point of above-named hills known as the 'Punta

de Loma,''' and states that he there "set stake marked 'S. P. 14'"; and, in the patent, the boundary of the ranch upon this course is described as "along westerly slope of abrupt hills called 'Lomas de Santa Paula,' 492 chains, to stake marked 'S. P. 14' station, at the most southern point of above-named hills, known as the 'Punta de Loma.''' It thus appears that the extremity of this course, and the station at which the stake marked "S. P. 14" was set, is "the most southern point of above-named hills, known as the 'Punta de la Loma,''' and the literal construction of the language used in its description makes "the above-named hills" include the entire Lomas de Santa Paula, and also makes the "Punta de la Loma" synonymous with the most southern extremity of the entire Lomas, so that the stake marked "S. P. 14" would have been set at the Punta of the Lomas, and not at the southernmost point of the Punta. The topography of the country along which this line extends is confirmatory of this construction. The Lomas de Santa Paula is a range of hills lying to the southeast of the Santa Clara river and terminating where they enter the plain of the Santa Clara valley in a prominent headland called the "Punta de la Loma." The hills themselves are abrupt on their northerly or northwesterly side, with a gentle slope on their southerly side. This Punta or southern extremity of the hills has a face of about two hundred feet, is oval in shape, and abrupt toward the north near the river, but with a gradual slope to the south and west. As the course itself runs along the axis of the hills, or nearly so—the general trend of the hills from the Punta being about north, fifty degrees east—it was natural for the surveyor to terminate the course at the extremity of the hills; and as he designated the slope along which the course ran as the westerly, rather than the northwesterly, slope of the hills, he would also naturally designate the extremity of the hills to which he carried the course as the southernmost point thereof. His subsequent designation of that extremity as the "Punta de la Loma" was only for the purpose of adding another description to the one which he had already given, and is to be taken as synonymous with it. The court was therefore called upon to ascertain in what point of the Punta the station S. P. 14 had been placed, and was not required to place it at the southernmost point of the

Punta itself. For this purpose it was proper to receive in evidence and consider the field-notes and description in the patent for the adjoining rancho, Santa Clara del Norte. The boundaries of these two ranches are coincident for a distance of several miles, and were surveyed by the same surveyor at about the same time, in December, 1860; and it appears from the field-notes of the Rancho Santa Clara del Norte that the Santa Paula Rancho was first surveyed, the fifteenth course of the description of the Santa Clara Rancho reading: Thence "to stake marked 'S. P. 14,' a corner of Rancho Santa Paula y Saticoy, on point of hill known as the 'Punta del Loma,' mark stake 'S. C. N. 4,' and run along boundary of Rancho Santa Paula y Saticoy through sandy bottom." As the station S. C. N. 4 in this rancho was identical with S. P. 14 of the Santa Paula Rancho, it was competent to show the location of the S. P. 14 by re-establishing S. C. N. 4, in accordance with the calls and monuments referred to in the patent for this rancho. If this station could be thus re-established, it would fix the place "on point of hill known as the 'Punta del Loma' " which had been designated as station "S. P. 14," and where the stake had been set. That the evidence introduced for this purpose tended to locate S. C. N. 4 at a point from which a line drawn to S. P. 13 would exclude the land of the defendants is not seriously controverted, and the finding of the court to that effect must be accepted as determinative of the proposition. Certain exceptions were taken to the rulings of the court in admitting evidence, but none of them are of such a character as to have affected the conclusion reached by the court. The judgment and order are affirmed.

We concur: Paterson, J.; McFarland, J.

SISSON, CROCKER & CO. v. JOHNSON et al.

No. 18,102; October 6, 1893.

34 Pac. 617.

Injunction Against Trespass.—A Complaint by a Corporation Operating a Sawmill, which alleges that plaintiff, the owner in fee of certain land, commenced the construction of a logging road thereon to convey timber to the mill; that defendants entered on the land, and obstructed the men employed by plaintiff in continuing the work, threatening to use violence should they persist, whereby the work was stopped; that such interruption was repeated when an attempt was again made to construct the road, and that defendants threaten such interruption whenever the work is attempted; that the road is necessary for the operation of the sawmill; and that defendants are insolvent—warrants the granting of a preliminary injunction.

APPEAL from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Sisson, Crocker & Co., a corporation, against F. M. Johnson and others, for an injunction. A preliminary injunction was granted, and, from an order denying a motion to dissolve the same, defendant Johnson appeals. Affirmed.

The complaint alleges that plaintiff is a corporation, and that it “was, on and before May 1, 1892, ever since has been, and now is, the owner in fee of” certain described land. It then alleges as follows: “That on or about May 15, 1892, said plaintiff herein commenced the construction of a logging road on the land hereinabove described, for the purpose of conveying the timber from said land to the sawmill of the said plaintiff, and that for said purpose said plaintiff employed a large number of men, to wit, about seven men, at a great expense, to wit, about twenty-five (\$25) dollars; that on or about May 25, 1892, the said defendant herein entered upon the premises hereinabove described, and obstructed and prevented the men employed as aforesaid by said plaintiff for the purpose of building said logging road from continuing their work thereon; that said defendants did at said time threaten to use violence toward said men, if they, or any of them persisted in

constructing said logging road on said lands, and that the men so employed by said plaintiff as aforesaid were by said threats of said defendants frightened, and prevented from continuing their work on said logging road, and that the construction of said logging road was thereby wholly stopped; that said plaintiff caused said men to attempt, on several different occasions, to continue their work on said logging road after the first interruption by said defendants, and during said month of May, but that said defendants at each time prevented the continuance of said work, and threatened to do so, by violence, whenever said plaintiff or its employees shall attempt to construct said logging road; . . . that the plaintiff is now, and at all of the times since May, 1892, has been, the owner of, and engaged in operating, a sawmill near the town of Sisson, in Siskiyou county, California, and that the timber for the transportation of which the aforesaid logging road is being constructed is necessary for the successful operation of said sawmill, and that unless the said defendants are restrained, by the order of the court from preventing the construction of the aforesaid logging road, and the transportation of timber on the same to said mill, the said plaintiff will be compelled to either close said sawmill, or operate the same at a loss; that the continuance of the aforesaid acts of said defendants, as hereinbefore alleged, will cause said plaintiff great and irreparable damage, and that defendants, as herein above stated, have heretofore and do now threaten to prevent the construction of said logging road by all means within their power; that the said defendants are, and each of them is, insolvent, and unable to respond in damages to plaintiff. Wherefore, said plaintiff prays that the said defendants, and each of them, their agents, employees, attorneys, and all persons claiming by, through, or under them, or either of them, be, by the order of this court, enjoined and restrained from in any way or manner interfering with the said logging road, or the proposed construction thereof on the land hereinabove described, and from interfering with the employees, and all of them, engaged at this time, or who may hereafter be engaged, in constructing said logging road, or any part thereof; also, from in any manner interfering with the land hereinabove described, or the timber situated thereon, or the employees of plaintiff operating thereon, for plaintiffs' costs

of suit herein, and for such other or further relief as to the court may seem proper."

Warren & Taylor (T. M. Osmont, of counsel) for appellant; Gillis & Tapscott and E. J. Emmons for respondent.

DE HAVEN, J.—Appeal from an order refusing to dissolve a preliminary injunction. The complaint states facts sufficient to justify the issuance of the injunction sought to be dissolved, and the court did not err in its ruling upon the motion to dissolve the same. Order affirmed.

We concur: Fitzgerald, J.; McFarland, J.

NELMES *v.* WILSON.

No. 19,094; October 7, 1893.

34 Pac. 341.

Appeal—Time of Taking—Review of Evidence.—Under Code of Civil Procedure, section 939, permitting an appeal within a year of entry of judgment, but inhibiting consideration of an exception to the decision, as being unsupported by evidence, unless the appeal is within sixty days after rendition of judgment, the evidence cannot be considered on an appeal taken after the sixty days.

Nonsuit—Exceptions.—Error in Granting Nonsuits is an error in law which must be excepted to that it may be considered on appeal.

APPEAL from Superior Court, Los Angeles County; William P. Wade, Judge.

Action by Thomas Nelmes against James G. Wilson. Judgment for defendant. Plaintiff appeals. Affirmed.

Gould & Stanford for appellant; Johnson & Rodman for respondent.

SEARLS, C.—This action is brought to annul a contract for the purchase of a lot of land in the city of Pasadena, county

of Los Angeles, entered into between the assignor of plaintiff and grantor of defendant on the thirty-first day of August, 1887, and to recover back so much of the purchase money as had been paid on account of such contract. Defendant answered, admitting the execution of the contract, and denying most of the other allegations of the complaint. He also filed a cross-complaint, asking for the specific performance of such contract, and judgment for the amount remaining due thereon. At the trial a nonsuit was ordered against plaintiff, and defendant had final judgment in his favor as prayed for in his cross-complaint. The appeal is from the final judgment, supported by a bill of exceptions. Said judgment was rendered February 13, 1892, but not entered until March 8, 1892. The appeal was taken May 6, 1892, more than sixty days after the rendition of the judgment, and within sixty days of its entry. Section 939 of the Code of Civil Procedure provides that an appeal may be taken from a final judgment commenced in the court in which the same is rendered within one year after the entry of judgment. "But an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment." Under the rule enunciated in *Schurtz v. Romer*, 81 Cal. 244, 22 Pac. 657, we are precluded from reviewing the evidence contained in the bill of exceptions for the reason that the appeal was not taken within sixty days after the rendition of the judgment. The record fails to show that any exception was taken to the action of the court in granting the nonsuit. An error in granting a nonsuit is an error in law, and must be excepted to, or it will not be reviewed on appeal: *Malone v. Beardsley*, 92 Cal. 150, 28 Pac. 218; *Flashner v. Waldron*, 86 Cal. 211, 24 Pac. 1063; *Warner v. Darrow*, 91 Cal. 310, 27 Pac. 737. The findings are within the issues made by the pleadings and support the judgment. The judgment appealed from should be affirmed.

We concur: Belcher, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

MOORE v. MOTT et al.

No. 19,158; October 7, 1893.

34 Pac. 345.

Attachment—Action on Bond—Judgment—Presumption.—In an action on a bond given to secure release of attached property, conditioned for liability in case judgment was rendered against defendant in attachment, a finding that a judgment was not rendered is not warranted where, in the record of the attachment suit subsequent to a judgment of nonsuit, appears a judgment for plaintiff therein, as to the legality of which there is no evidence, there being a presumption in its favor.

APPEAL from Superior Court, Los Angeles County; W. N. Clark, Judge.

Action by Alfred Moore against S. H. Mott and W. C. Furney. Judgment for defendants. Plaintiff appeals. Reversed.

S. B. Gordon for appellant; John D. Bicknell, J. W. Swanwick and A. W. Hutton for respondents.

PER CURIAM.—This action is upon an undertaking given to procure the release of property from an attachment. The writ was issued in an action brought by Alfred Moore, as plaintiff, against one Dorward. The undertaking is in the form prescribed by statute, and a copy is attached to the complaint. It recites the issuance and levy of the attachment, that the defendant had applied to the court for an order releasing and discharging the property from the operation of the attachment, and that the court had fixed the value of the property attached at \$1,200; and in consideration of the premises the sureties (defendants herein) undertook and promised that, in case the plaintiff recovered judgment, defendants would, on demand, redeliver the attached property to the sheriff, to be applied to the payment of the judgment, or, in default thereof, the sureties would pay, on demand, to the plaintiff, the sum of \$1,200. It is averred in the complaint that plaintiff, on the 8th of November, 1889, recovered a judg-

ment against the said Dorward, in the said attachment suit, for \$831.63, and that due demand had been made on said defendants for payment. The defendants, appearing by their respective counsel, (1) deny that plaintiff did recover judgment in the attachment suit against Dorward; and (2) aver that, in said attachment suit, Dorward recovered judgment against the plaintiff, wherein it was adjudged that the plaintiff take nothing by his said action, and that said Dorward recover his costs, which were therein taxed at \$27.50; and that on the 10th of July, 1889, said Alfred Moore paid said judgment in full; and that since such payment no action has been pending in favor of said Moore against said Dorward. And it is contended that, if such were the facts, the judgment upon which the plaintiff depends was absolutely void, and also that defendants were discharged from their obligation on said undertaking by said judgment and its payment. The case was tried without a jury, and among other facts the court found: “(3) That plaintiff did not, prior to July 10, 1889, nor on or about the eighth day of November, 1889, nor at any other time, recover any judgment in said action against said Dorward, or in any other action, as alleged in the complaint, or otherwise; nor was any such judgment in favor of the plaintiff, Moore, ever entered or docketed in the office of the clerk of Los Angeles county at any time.”

Upon the motion for a new trial it is contended that this finding was not sustained by the evidence. The sufficiency of the specification is complained of principally, as it seems to me, because more is stated than was necessary. The finding includes but one fact, and the specification is that the finding is not sustained by the evidence. It then proceeds unnecessarily to state what the evidence did show in relation to that issue. Though not required, this did not vitiate the specification. From the transcript it appears that plaintiff put in evidence a judgment in the case of Moore v. Dorward, dated November 8, 1889, and docketed November 12, 1889. In this judgment it is recited that the cause “came regularly on for trial on the eighth day of November, 1889, M. Whaling, attorney, appearing for plaintiff; and a supplemental complaint having been filed and served upon defendant’s attorney, and no answer or demurrer having been filed, and the time allowed by law for answering or demurring having expired, a default

of the defendants for failing to answer or demur to plaintiff's supplemental complaint was duly entered. And plaintiff produced his proofs as to his amended complaint filed and answered, and it appearing therefrom that there is now due and unpaid plaintiff Alfred Moore from the defendant, W. W. Dorward, the sum of \$831,63," etc., judgment was thereupon entered against said Dorward for that sum, with costs. It is recited in the transcript, "which judgment was duly entered and docketed November 12, 1889, the record of which plaintiff then introduced in evidence." No judgment-roll is found in the transcript. Plaintiff then proved execution issued on said judgment, which was returned unsatisfied, and then rested. Defendants then introduced a judgment-roll in the same action—the attachment suit—in which judgment it is recited that the "case came on regularly for trial on the 24th of May, 1889, Michael Whaling appearing for the plaintiff, and Reymert, Orfila & Reymert for defendant. . . . Whereupon witnesses on the part of plaintiff were duly sworn and examined, and documentary evidence introduced, and it appearing from the testimony of plaintiff himself that no cause of action existed at the time of the commencement of this action, whereupon the defendant, Dorward, moved the court for a judgment of nonsuit, . . . and after due deliberation thereof the court grants said motion, the plaintiff having failed upon said trial to prove a case for the court, and the court orders a judgment of nonsuit to be entered herein." Whereupon it was "ordered, adjudged and decreed that said plaintiff is hereby nonsuited, and that plaintiff take nothing by said action," and costs were awarded to Dorward, amounting to \$27.50. Although it is recited that the judgment-roll was introduced in evidence, none is found in the statement. Defendants also introduced an execution on said judgment, and the return of the sheriff showing that it had been levied on the real property of Moore, June 12, 1889, and was paid in full by Moore, July 10, 1889. They also proved that Dorward left the state soon after May, and before August, 1889, and has never returned. Defendants then rested, and, in rebuttal, plaintiff proved that in the attachment suit he gave notice of a motion for a new trial, served on Reymert, Orfila & Reymert, as Dorward's attorneys, June 1, 1889, and which was filed on the same day; that a statement on a motion

for a new trial in the same case was served June 13th, and was settled and certified as correct on the 26th of June of the same year; and that, on the 19th of September, 1889, a stipulation was filed, entitled in said cause, signed by Reymert, Orfila & Reymert, as attorneys for Dorward, "that plaintiff may have granted his motion for a new trial." Plaintiff failed to prove that an order granting a new trial was made otherwise than by the second judgment, which he contends conclusively shows that the first judgment was vacated in some lawful mode. In the absence of any bill of exceptions, or other showing to impeach the action of the court, the fact that a second judgment is found in the judgment-roll, or upon the records of the court, presumes that it is rightly there, and in any proceeding in which such judgment is collaterally presented it must be assumed as a valid act of the court: *Paige v. Roeding*, 96 Cal. 388, 31 Pac. 264; *Water Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878. It follows, therefore, that the third finding is not sustained by the evidence, and for this reason the court should have granted a new trial. The order is reversed.

SAN GABRIEL VALLEY LAND AND WATER COMPANY v. DENNIS.

No. 19,148; October 9, 1893.

34 Pac. 441.

Corporations—Recovery of Stock Assessments.—In an action to recover an assessment on corporate stock, evidence that the assessment was made on the same day that defendant purchased the stock is sufficient to show that it was made while defendant was the owner of the stock, as it will not be presumed that the assessment was made a fraction of a day before the purchase.¹

Corporations—Suit for Assessment.—A Resolution by the Board of directors "that the president and secretary are hereby ordered to commence suit for the collection of assessment" on stock sufficiently shows a waiver of further proceedings under the chapter for the collection of delinquent assessments.

¹ Cited in the note in 93 Am. St. Rep. 388, on liability to corporations of subscribers to their capital stock.

APPEAL from Superior Court, Los Angeles County; W. P. Wade, Judge.

Action by the San Gabriel Valley Land and Water Company against L. W. Dennis to collect an assessment on stock. There was a judgment in favor of defendant, and plaintiff appeals. Reversed.

A. H. Judson and M. C. Hester for appellant; Wells, Monroe & Lee for respondent.

PATERSON, J.—This is an action to recover from respondent, who was a stockholder of the plaintiff corporation, the unpaid balance of an assessment upon eighteen hundred and eighty-three shares of its capital stock. The court below found that the respondent was not, at the time the assessment was levied, the owner of the stock, and that the board of directors had not, before the commencement of this action, elected to waive further statutory proceedings to collect the assessments. It was alleged in the complaint that the defendant was at all times mentioned therein the owner and holder of eighteen hundred and eighty-three shares of the capital stock of plaintiff, for which he had subscribed and agreed to pay. The answer simply denied that the defendant “ever was at any time owner or holder of eighteen hundred and eighty-three shares of the subscribed capital stock of said corporation.” This denial in effect admitted that he was the owner and holder of eighteen hundred and eighty-two shares of the stock. But it is claimed by respondent that the plaintiff, having introduced evidence to prove that Dennis was a stockholder, treated the denial as sufficient, and cannot now be heard to question its sufficiency. But, in order to prove that the defendant was the owner of more than eighteen hundred and eighty-two shares, to wit, eighteen hundred and eighty-three shares, the plaintiff was compelled to offer the evidence which he introduced, and the authorities cited by respondent do not apply. But, however this may be, the evidence showed that the defendant was the owner of the stock. It showed that the assessment was made on the day the certificate of stock was issued. It is true it was not shown by

the plaintiff that the purchase of the stock preceded the assessment, but no presumption can be indulged that the assessment was made a fraction of a day prior to the purchase by the defendant of the stock, especially in view of the fact that it was shown that the defendant had paid a portion of the assessment, and requested further time to pay the balance.

The court's second conclusion of law is equally untenable. It is based upon the alleged insufficiency of the resolution of the board to show a waiver of further proceedings under the chapter for the collection of delinquent assessments. It is found that all of the proceedings of the board with respect to the assessment were regular and valid, but it is claimed that no action can be maintained under section 349, Civil Code, unless the board in its resolution expressly declared its intention to waive further proceedings. The resolution referred to, and which was passed on the day fixed for the sale of the delinquent stock, reads as follows: "Resolved, that the president and secretary are hereby ordered to commence suit immediately to enforce the collection of assessment No. 5 on the following delinquent stock in the San Gabriel Valley Land & Water Company." Here follows a description of the stock and name of owner. This resolution, we think, is a sufficient indication of the intention of the corporation to waive further proceedings under the chapter for the collection of delinquent assessments, and to proceed only thereafter by action. The court erred in granting the nonsuit, and the motion for a new trial ought to have been granted. Judgment and order reversed and cause remanded for a new trial.

We concur: Harrison, J.; McFarland, J.

NEW ZEALAND INSURANCE COMPANY v. BRADBEER.

No. 19,192; October 10, 1893.

34 Pac. 445.

Appeal.—Where the Evidence, Though Conflicting, is quite sufficient to support the findings of the lower court, the judgment based on such findings will not be reversed on appeal.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by the New Zealand Insurance Company against George Bradbeer. From a judgment for plaintiff, defendant appeals. Affirmed.

Ben Goodrich for appellant; John D. Pope and Lacy & Trask for respondent.

PER CURIAM.—The plaintiff, a foreign corporation, was engaged in the insurance business in this state from July, 1887, to and including January, 1891. Its principal place of business was in the city of San Francisco, but it had a branch office in the city of Los Angeles. From January, 1888, to January 10, 1891, defendant was the agent of plaintiff, and the manager of its business at its Los Angeles office, and as such was charged with the receipt and disbursement of its funds at that office. In August, 1891, plaintiff brought this action to recover from defendant the sum of \$1,600, alleged to have been collected by him as such agent and manager from various persons to and for the use of plaintiff, and not paid over or accounted for, though demand for its payment had been made. The answer of defendant was a general denial. The case was tried without a jury, and the court found, in effect, that the defendant had received for and on account of the plaintiff sums of money which he had not paid over nor accounted for, aggregating, with the interest thereon, \$798.95. The court accordingly gave judgment in favor of the plaintiff for the sum named, from which, and from an order denying his motion for a new trial, the defendant appeals.

The principal contention on the part of the appellant is that the findings were not justified by the evidence. The evidence brought up in the transcript covers more than two hundred and twenty printed pages, and it would subserve no useful purpose to attempt to set it out or state its substance. A careful inspection of the record, however, shows that, while the evidence is conflicting in many respects, it is still quite sufficient to uphold and justify the findings. The judgment, therefore, cannot be reversed on this ground.

The only other ground urged for a reversal is that the findings do not cover all the issues raised in the case. This point cannot be sustained. The findings are full and explicit as to all the items for which judgment was given in favor of the plaintiff; and, as to the others, no special findings were necessary, for the reason that as to them the judgment was in effect in favor of the defendant. It results that the judgment and order appealed from must be affirmed, and it is so ordered.

PEOPLE v. ABBOTT.

No. 20,985; October 10, 1893.

34 Pac. 500.

Burglary—Possession of Stolen Property.—In a burglary case it appeared that a Chinaman's trunk and pipe were stolen from the burglarized building. There was evidence that two persons carried a "China trunk" from the lot on which the building was situated about the time the crime was committed; that defendant and others were seen with such a trunk about that time; and that such Chinaman's trunk was found open two days afterward, a considerable distance from the building. There was no evidence that a "China trunk" is any different from any other trunk. The pipe was put in evidence, but there was no testimony as to where it was found. Held, that the evidence did not justify an instruction as to the effect of possession of property recently stolen.

Burglary.—It is Error to Charge That the Possession of stolen property soon after the taking, while not sufficient to justify a con-

viction, is a "guilty circumstance," and that defendant was bound to explain the possession in order to remove its effect.¹

Criminal Trial—Misconduct of Judge.—Where a witness for the State, in a criminal case, is absent when wanted, and is brought in by an officer, it is error for the court, in the presence of the jury, to hold a colloquy with such witness, which tends to discredit defendant and his counsel, and lead the jury to believe that, if they were not guilty of a grave offense in procuring the absence of the witness, they were, in the opinion of the court, capable of committing it, and that such conduct on their part could only be induced by consciousness of defendant's guilt.

APPEAL from Superior Court, Los Angeles County; B. N. Smith, Judge.

George Abbott was convicted of burglary and appeals. Reversed.

C. C. Stephens for appellant; Attorney General Hart for the people.

HAYNES, C.—An information charging Amos Abbott, George Abbott and Albert Acevedo with burglary, committed on the fifth day of September, 1891, in the room of one Ah Sic, in the city of Los Angeles, was filed by the district attorney. The defendants severed. Appellant George Abbott pleaded not guilty, was tried, found guilty by the jury, and sentenced to imprisonment for the term of five years. A motion for a new trial was made and denied, and from the judgment and the order denying a new trial defendant appeals.

A very large number of exceptions were taken by appellant upon the trial, and referred to in the brief of his counsel, but we regret to say that the brief gives us little aid beyond the mere reference to the folio in the transcript where the exceptions are found; and on the part of the people the brief by the attorney general, prepared and signed by his first deputy, is little more than a pert, if not impertinent, denial that there is anything of merit in the alleged errors referred to by appellant's counsel. Where the protection of the people against

¹ Cited in *People v. Gibson*, 16 Cal. App. 350, 116 Pac. 989, where the court says in effect that if this means that such would be error even if it was charged in addition that possession is not of itself sufficient evidence on which to convict "it must be deemed to be overruled."

crime upon the one side and the liberty of the citizens is at stake upon the other, the questions involved are of such importance as to require a careful examination and discussion by counsel in order that just conclusions may be reached by the court. Ah Sic and Ah Poy, whose property is alleged to have been burglariously stolen, were partners and proprietors of a Chinese drug-store on Marchessault street, in the city of Los Angeles. In the rear of the room occupied as a drug-store was a room used as a public reception-room. To reach this room persons passed from a door in the side of the drug-store into a hall which extended back past two or three other rooms to a kitchen, and from this hall was an entrance into the room immediately in the rear of the drug-store. The next room in the rear of the reception-room was Ah Sic's sleeping-room, in which the property alleged to have been stolen was kept. The testimony tends strongly to show that this reception-room was visited by many persons, of all colors and nationalities, for the purpose, among other things, of purchasing Chinese lottery tickets; and on the evening of September 5th the defendant, with his brother and many other persons, were in this room for a considerable time—how long will be hereafter noticed—but the room appears to have been open, and different persons going to and coming from it from early in the evening until the discovery of the alleged burglary, about a quarter past 10 o'clock. Between the storeroom and this reception-room was a small glass window, through which one in the drug-store could observe those in the reception-room, and those in the reception-room could see those coming into the storeroom. The burglary was effected by boring through a board partition between Ah Sic's room and an unoccupied building near or adjoining that room so as to remove the boards for a sufficient space to take out, through the opening, a trunk which is said to have been stolen. The only article, aside from the trunk, shown to have been stolen, was an opium pipe, which Ah Sic testified was on that evening lying upon his bed in the same room. In the trunk was some clothing, not described in the evidence, a small bamboo basket containing silver, and gold in a buckskin bag, amounting in all to some seven or eight hundred dollars. A Chinaman named Ah Tung testified that a little after 10 o'clock the night of the burglary he saw the defendant and another man carrying a

chest, coming out of Ah Sic's back yard, and saw them go out through the gate of the fence, but he did not know at that time of the burglary, and did not think there was anything wrong, but next morning learned it was "stealing." Pierce Boyle, a witness on the part of the prosecution, testified that he saw two men coming out of the gate from the Chinaman's back yard; that they went under a pepper tree, and put the box down there, and then blew a whistle on their fingers, and two more young men came up; and further testified in that connection: "Well, then I saw the other two young men come up round a big load of hay there in the middle of the street. They got the box, and I told them, 'Hello, boys; hold on there'; and I picked up a rock and throwed the rock after them, and then they blew a whistle. These two men had a box between them, running, sort of like a Chinaman's. They were what I would call trotting. They came with the box within fifteen feet of me. I measured it since. When I first saw them they were coming from the Chinaman's house." This witness did not identify any of the men he saw in connection with the box. This witness fixed the time of this transaction at "10 o'clock, or maybe a quarter past." Ah Ngau testified that he saw the defendant and three other men with a Chinese chest or trunk at the corner of Alameda street and the convent; that he was coming up from the old railroad depot toward Chinatown, and they were going toward the convent; that the defendant and another one with him was carrying the chest, and the other two followed two or three steps behind; that when he got to his room, about two blocks from where he met them, it was a quarter after 10; that he had been to a laundry near the old depot to see a friend. Ah Ging testified that he went to the old depot with a friend who was going to take the train for San Francisco; that they went a little after 10 o'clock to the depot. As he was going he saw the defendant and another whom he did not know carrying a chest. That he knew the two that were following by sight, but not their names. That where he saw them was between Alameda street and a small street running into it from the west, just opposite the lumber-mill. That they were crossing Alameda street, and he was going toward the depot. The burglary occurred Saturday night, and on Monday at noon the trunk or chest was found in a corn-field, down toward the river, a considerable distance

from the place of the burglary. The trunk had been broken open and the clothing scattered around. Neither the pipe nor any of the contents of the trunk were at any time found in the possession or in any manner connected with the defendant, and there was no evidence of his possession of the stolen property other than that above stated, namely, that he was seen with others carrying a box or chest, but there was no evidence tending to identify the box or chest which was carried with the one that was stolen, other than the circumstances above stated.

I have stated so much of the testimony for the purpose of showing the materiality of certain instructions given and refused upon the questions of identification of the defendant, and inferences to be drawn from the possession of stolen property. Upon the latter question the court, at the request of the district attorney, charged the jury as follows: "The mere possession of stolen property, unexplained by the defendant, however soon after the taking, is not sufficient to justify a conviction; it is merely a guilty circumstance, which, taken in connection with other testimony, is to determine the question of guilt. Yet if you believe from the evidence that the defendant was found in the possession of the property described in the evidence, or claiming to be the owner thereof, after the alleged burglary, this is a circumstance tending in some degree to show guilt, but not sufficient, standing alone and unsupported by other evidence, to warrant you in finding him guilty. There must be, in addition to proof of possession of property stolen from the premises described in evidence, proof of corroborating circumstances tending of themselves to establish guilt. These corroborating circumstances may consist of acts or conduct or declarations of the defendant, or any other circumstances tending to show the guilt of the accused. If the jury believe from the evidence the property mentioned in evidence was stolen from the premises described in evidence, and was seen in the possession of the defendant shortly after being stolen, the failure of the defendant to account for such possession or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the

evidence disclosed any such." Conceding, for the moment, that the instruction as given correctly stated the law as an abstract proposition, it was not applicable to the facts of the present case. Before a defendant can properly be called upon to account for the possession of stolen property, the circumstances must be such as would make silence as to such possession an evidence of guilt. Here the fact of possession was denied. The defendant could not explain his possession of the goods without admitting that he had possession. If he had been arrested with the trunk in his hands, and had been asked by the officer where and how he got it, he would have been called upon to speak, and his silence, if he refused to speak, as well as his answer, if false, would have been evidence against him. Defendant's alleged possession of the property depended upon a double identification: First, that the trunk or chest carried by the two men was the property stolen from Ah Sic; and, second, that defendant was one of the men who carried it. The only identification of the trunk was that the one found in the corn-field on Monday was the one taken from Ah Sic the Saturday night preceding, while the only evidence tending to identify the trunk carried by the men with the one found in the corn-field was that it was "a China trunk"; but there was no evidence that a China trunk is different from any other trunk. No other description was attempted by any of the witnesses who claimed to have seen the defendant helping to carry it. The pipe was produced in evidence, but there is no testimony from beginning to end as to where it was found. It was not in the trunk at the time of the burglary, and it is not probable that it would have been stolen from the bed, and carried to the corn-field, and left there with the broken trunk; nor was any part of the contents of the trunk found in possession of the defendant or in any manner accounted for. Nor was the identification of the defendant as one of the men who carried the trunk more satisfactory. The evidence of the Chinamen who testified that they recognized the defendant as one of the men who carried the trunk was not only open to serious doubt and criticism, but the evidence on the part of the defendant, if true, would seem to make it clear that the man identified by the Chinaman as the defendant could not have been the defendant. Wills, in his work on Circumstantial Evidence, sixth American from the

fourth London edition, page 63, in discussing the subject under consideration here, says: "The rule under discussion is occasionally attended with uncertainty in its application from the difficulty attendant upon the positive identification of articles of property alleged to have been stolen; and it clearly ought never to be applied where there is reasonable ground to conclude that the witnesses may be mistaken, or where from any other cause identity is not satisfactorily established."

In the cases cited at the end of the above quotation, it will be seen that the circumstances under which instructions similar to the above were given did not involve the uncertainties as to the identification of the property or of the person that were so prominent here. In *People v. Gill*, 45 Cal. 285, four horses were stolen during the night, and the next day the defendant was seen riding one of the horses, accompanied by another man, and the two had the four stolen horses with them. There seems to have been no question whatever as to identity made in the case. In *People v. Clough*, 59 Cal. 438, the defendant was charged with robbery. The person robbed immediately notified the chief of police, who made immediate pursuit, and captured the defendant within a few minutes after the robbery was committed. The property which had been taken from the prosecuting witness was found upon the defendant, and the only explanation he gave of such possession was that he had "picked up the watch." In *People v. Velarde*, 59 Cal. 457, the property alleged to have been stolen consisted of cattle, which were found in defendant's possession, who undertook to account for his possession and ownership. In such cases as these an instruction upon the subject of possession of the stolen property shortly after the alleged larceny is proper, but those cases are very different from the one at bar. I think, too, the matter of this instruction is subject to serious criticism. It states directly that the possession of stolen property soon after the taking, while not sufficient to justify a conviction, is "a guilty circumstance." In *People v. Cline*, 74 Cal. 575, 16 Pac. 391, the jury was instructed that "the mere possession of stolen property recently stolen is not of itself sufficient evidence to convict. The possession of stolen property, supported by other evidence tending to show guilt, is a strong circumstance tending to show

guilt.” This court said, Searls, C. J., delivering the opinion: “It is not a question of law upon which the court should instruct the jury, but one of fact, which is wholly within the province of the latter. In deducing the ultimate fact of guilt or innocence, they are the sole judges of the weight to be given to the probative fact of possession of property recently stolen, and stamping the character of such possession.” In the case of *State v. Hodge*, 50 N. H. 521, in discussing this question, the court said: “The resemblance between inconclusive presumptions of law and strong presumptions of fact cannot have escaped notice—the effect of which being to assume something as true until rebutted; and, indeed, in the Roman law and other systems where the decision of both law and fact is intrusted to a single judge, the distinction between them becomes in practice almost imperceptible; but it must never be lost sight of in the common law, where the functions of judge and jury should always be kept distinct. Unfortunately, however, the line of demarcation between the different species of presumptions has not always been observed with the requisite precision. We find the same presumption spoken of by judges, sometimes as a presumption of law, sometimes as a presumption of fact, sometimes as a presumption which juries should be advised to make, sometimes as one which it is obligatory on them to make. . . . The law is burdened and obscured by a great mass of common opinion, general understanding, practice, precedent, and authority (including the presumption from possession of stolen property) that has passed for law, but is in truth not law, but fact, coming down to us largely by descent from the ancient custom of the judge giving the jury his opinion of the evidence. To clear the law of this encumbrance, revive elementary principles strictly legal in their nature, separate the province of the court from the province of the jury, and maintain the latter in its entirety, is a duty put upon us by the constitution. . . . When, therefore, we have come to the conclusion that the presumption from possession of stolen goods is a presumption of fact, we find ourselves prohibited by the constitution from delivering to the jury the presumption as to a result binding upon them, or a rule by which they are to be governed.” The statement, therefore, in the instruction that the possession of the property was a guilty circumstance, required

the jury to give weight to some extent to the fact of possession, and, with the further statement that the accused is bound to explain the possession in order to remove its effect, under the circumstances of this case, I think was error. It would have been proper for the court to have informed the jury that the possession of the property by the defendant, if they found as a fact that he had such possession, might be considered by them in connection with all the circumstances of the case, but not that they were bound, as the instruction implied, to give it some weight against the defendant, or that the defendant, if they found he had possession of the property, was placed under such circumstances as required him to account for that possession; for whether the circumstances were such as to require an explanation is itself a question of fact which the jury are authorized to determine, and was not a matter of law which they were bound to observe. The defendant was not apprehended with the property in his possession, and no circumstance transpired prior to the trial requiring him to speak at all in regard to his alleged possession of the trunk. If he had not gone upon the stand as a witness, no comment could be made to the jury upon his failure on that occasion to account for his possession of the property, and, that being true, his failure while upon the stand to give any account of a possession which he denied having is equally placed beyond comment either by the district attorney in his argument or by the court in its instructions to the jury.

Upon the trial, Pierce Doyle was called as a witness for the people. Upon being sworn, the following colloquy occurred between the court and the witness: "The Court: Why did you leave the courtroom? Answer. I though I could go down and get a drink and get back in time. Question. Did Mr. Stephens offer you any money to go away? A. No, sir; no one gave me none. Q. Did he tell you to go away? A. No, sir; he did not speak to me. Q. Did the defendant tell you to go away? A. No, sir. Q. Did the defendant offer to give you any money to go away? A. No, sir; no one did. The court, in the presence of the jury: This looks very singular, indeed." (Mr. Stephens was defendant's attorney.) The transcript contains the following explanation of this colloquy: "Amos Abbott, a witness and brother of defendant,

left suddenly for the Islands the day before this trial was called. A motion for continuance by defendant was based on such absence. Counsel for defendant refused to have the absent witness' testimony, which was complete and full, taken on former trial of same case, read in evidence, and persisted in his motion. The witness Doyle was wanted the night before, and was absent. He came into the courtroom before court called, and when wanted was absent, and an officer was sent to bring him in, and the court interrogated him as above." The affidavit for continuance above referred to was made by the defendant, and was sufficient in substance and in form. The fact that the witness had before testified, and that his testimony could be read, the prosecution assenting thereto, did not make it improper that a continuance should be applied for, even though it may have justified the court in refusing the motion. Whether the court erred in refusing the motion need not be considered, as the presence of the witness was procured, and the defendant was therefore not prejudiced by the denial of his motion. There was nothing, however, in that matter, nor in the absence of the witness Doyle, that could possibly justify the grave imputation against the defendant or his counsel implied in the above-quoted examination of the witness by the court. It inevitably tended to discredit both the defendant and his counsel, and to lead the jury to believe that if they were not guilty of a very grave offense against the administration of justice in procuring the absence of the witness, that they were, in the opinion of the court, at least capable of committing it, and that such conduct on their part could only be induced by a consciousness that defendant was guilty of the crime for which he was being tried. That this must have operated to the prejudice of the defendant throughout the trial is apparent, and for this reason, if no other, a new trial should be granted. No improper motive is attributed to the court in this matter, but if the circumstances were such as to impress the court with a grave suspicion that the witness had been tampered with, the investigation should not have been proceeded with in the presence of the jury, further than to inquire of the witness the cause of his absence. The judgment and order appealed from should be reversed and a new trial granted.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial granted.

DE HAVEN, J.—I concur in the judgment.

PEOPLE v. LARSEN.

No. 20,991; October 10, 1893.

34 Pac. 514.

Robbery—Evidence of Accomplice—Corroboration.—Where the only evidence to convict defendant of a robbery is that of an accomplice, who testifies that defendant planned the robbery and received part of the proceeds, and that of two witnesses, that they had seen defendant and the accomplice together on two occasions before the robbery, there is no such corroboration of the evidence of the accomplice, as required by Penal Code, section 1111, as to justify conviction.

APPEAL from Superior Court, Fresno County; S. A. Holmes, Judge.

Albert Larsen was convicted of robbery and appeals. Reversed.

Frank H. Short and G. C. Freeman for appellant; Attorney General Hart for the people.

VANCLIEF, C.—The defendant and George Green were, by information, jointly accused of the crime of robbery. They demanded separate trials, and upon the separate trial of the defendant the jury returned a verdict of guilty, recommending defendant to the mercy of the court. Thereupon the court sentenced him to imprisonment in the state prison for the term of forty years. He appeals from the judgment and from an order denying his motion for a new trial.

The principal point upon which appellant relies for a reversal of the judgment is that the only evidence tending to connect him with the commission of the crime was the testimony of an accomplice—one Cliff Ragan—whose testimony was not corroborated as required by section 1111 of the Penal Code, which reads as follows: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense or the circumstances thereof." It appears that the robbery was committed at a store owned by a Chinaman named Sun Kee, about 7 o'clock in the evening of April 27, 1892. Sun Kee was absent at the time, and the store was in charge of a Chinaman named You Kam, with whom was another Chinaman, named Wong Yee. Another Chinaman, named Wong Ki, was at his cabin somewhere near the store. The three Chinamen last named testified to the effect that they had known the defendant two or three years; that he lived three or four miles from China store; that he came to the store on horseback about fifteen minutes before 7 o'clock on the evening of the robbery, while You Kam and Wong Yee were at supper, and told them that he wanted to purchase certain articles from the store; that You Kam knew he had traded at the store before and had an unsettled account there. Thereupon the two Chinamen, You Kam and Wong Yee, went with defendant from the kitchen, where they had been eating, into the store, carrying a lighted lamp with them, You Kam going behind the counter, and Wong Yee taking a seat in front of the counter. While they were in this position, two robbers armed with a pistol and a rifle—one of them masked—rushed in. The masked robber, pointing his pistol at defendant and Wong Yee, drove them into a corner; and the other pointed his rifle at You Kam, who ducked under the counter. The masked robber then backed out of the door and shot through the window at You Kam, inflicting a slight flesh wound on one of his arms. Upon being thus wounded, You Kam fell upon the floor, feigning to be dead, and did not arise until after the robbers left. Immediately after the shot was fired both robbers tied the defendant and Wong Yee together, and one robber guarded

them with a drawn pistol while the other searched the house for money and other portable things of value. This done, they led defendant and Wong Yee out to a barn, where they left them still tied together, and departed. Soon after the robbers left, You Kam untied defendant and Wong Yee. After being untied, defendant remained at the store about three-quarters of an hour and then left for his home. The robber who was not masked was recognized by the Chinaman as George Green, who was accused of the crime jointly with the defendant, and had been separately tried before the trial of the defendant, but the masked robber was not recognized by any of the Chinamen. The foregoing is the sum and substance of the testimony of the three Chinamen; and there was no other witness to the fact of the robbery, except Cliff Ragan, who testified that he was the masked robber; that Green had a mask on but it fell off; the robbery had been planned and concocted by defendant, George Green, and himself a week or two before it was committed; that the part enacted by defendant at the robbery was in accordance with their plan; and that the proceeds of the robbery were divided between defendant, Green and himself. It appears that, at the time of the trial of the defendant, Ragan was in jail on a separate charge of having participated in this robbery, and also on a charge of an assault to murder, and on the trial of defendant he testified that he had served one term in the state prison for a felony, of which he was convicted in 1888; that his reason for confessing his guilt of the crime of robbery in this case was to get through with it and get off lighter, if he could; that the district attorney had told him that it would be easier on him if he told all he knew about it, and he might get off with two or three years, though the district attorney said he had no control over the amount of the punishment, which depended entirely upon the court. Darwin Lewis testified that he had seen defendant Green and Ragan together in defendant's corral near his house, about a week or fifteen days before the robbery, where they were castrating colts. William Downey testified that, about noon on the day of the robbery, he saw defendant and George Green in the town of Raymond, some two or three miles from the residence of defendant—first saw them tying their horses in front of his store; did not know they came together;

Green came into witness' store and bought some cartridges; defendant did not enter his store. James Downey saw Green in Raymond in the afternoon of the same day, but does not say he saw defendant on that day. The foregoing is the substance of all the evidence on the part of the prosecution, and no evidence was introduced by defendant.

We think that, without aid from the testimony of Ragan, the other evidence did not tend to connect the defendant with the commission of the robbery, and therefore did not sufficiently corroborate the accomplice: *People v. Thompson*, 50 Cal. 480; *People v. Ames*, 39 Cal. 403. No brief appears to have been filed on the part of the people in this case, but we understand that the attorney general submitted this case on his brief in the case of *People v. Green*, 99 Cal. 564, 34 Pac. 231. We have examined that brief, but find in it no attempt to answer the point above considered. I think the judgment and order should be reversed and the cause remanded.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded.

KLAUBER et al. v. SAN DIEGO STREET-CAR CO.

No. 19,189; October 10, 1893.

34 Pac. 516.

Appeal—Reversal—Law of Case.—On an appeal on the judgment-roll by plaintiff from a judgment for defendant, the supreme court reversed and directed the court below to enter a judgment on the findings for plaintiff in accordance with the prayer of the complaint. The court did so, and defendant excepted and appealed. Held, that the question whether the complaint stated a cause of action was decided on the former appeal, whether the demurrer was in the record or not. 98 Cal. 105, 32 Pac. 876, reversed.

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action by A. Klauber and others against the San Diego Street-car Company for specific performance. Judgment for defendant was reversed on appeal: 95 Cal. 353, 30 Pac. 555. Defendant appeals. Motion to dismiss denied: 98 Cal. 105, 32 Pac. 876. Judgment affirmed.

Gibson & Titus for appellant; Parrish, Mossholder & Lewis and Luce & McDonald for respondents.

PER CURIAM.—In this case judgment was originally entered in the court below for defendant. An appeal was taken by the plaintiffs to this court from the judgment upon the judgment-roll, and this court reversed the judgment and directed the superior court “to enter a judgment upon the findings in favor of plaintiffs, in accordance with the prayer of the complaint.” When the case went back to the superior court judgment was there entered for plaintiffs in strict pursuance of the said direction of this court. The defendant then procured the court below to settle a bill of exceptions, and upon the judgment-roll, including said bill of exceptions, he now appeals to this court. Respondents moved to dismiss the appeal upon the ground that the judgment of the court below, entered in accordance with the directions of this court as aforesaid, was final, but the motion to dismiss the appeal was denied in department, upon the ground that the bill of exceptions presented some questions that had not been passed upon at the former appeal: 98 Cal. 105, 32 Pac. 876. The main contention of appellant on this appeal is that the complaint does not state facts sufficient to constitute a cause of action, but that point was clearly and necessarily decided against the appellant’s contention on the former appeal. It appears that the demurrer to the complaint was not included in the judgment-roll as it came to this court upon the former appeal, but the appellant could easily have supplied it by a suggestion of diminution of the record; and the question of the sufficiency of the complaint to constitute a cause of action was before the court, whether the demurrer was in the record or not. The only other points made by appellant are that the findings are not sustained by the evidence, and that certain deeds were improperly

admitted in evidence; but neither of those contentions can be maintained, and we see nothing in them demanding special notice. The judgment appealed from is affirmed.

LUCO v. DE TORO.

No. 19,229; October 10, 1893.

34 Pac. 516.

Appeal—Remand—Obiter Dicta.—The Supreme Court, in Its **Opinion** reversing a case for lack of a certain and unambiguous finding on a material question of fact, added that, if the finding could be construed as in favor of respondent, it was enough to say that in the court's opinion it was not supported by the evidence. Held, that said remark was clearly obiter, and did not preclude the trial court from finding for respondent on substantially the same evidence, strengthening its conclusion by other new findings, based on the evidence, and probative of the main finding.

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action by Juan M. Luco against Juan de Toro for partition. The facts are recited in the opinion on the former appeal: 91 Cal. 405, 27 Pac. 1082. Judgment for defendant. Plaintiff appeals. Affirmed.

I. N. Thorne and Oliver P. Evans for appellant; Smith & Winder and Works & Works for respondent.

HARRISON, J.—The appellant's right of recovery depends upon the performance by Hartman of his contract with Olvera to procure the issuance of a patent for the Rancho Ex-Mission of San Diego. This agreement is set forth at length in the opinion of this court rendered upon the former appeal: 91 Cal. 405, 27 Pac. 1082. Upon that appeal the judgment of the court below was reversed for its failure to make a sufficient finding upon this issue. The finding which it had made was held to be ambiguous and

uncertain, inasmuch as in one part thereof the court found that immediately after the execution of the agreement Hartman entered upon the performance of the stipulations therein contained to be performed on his part, and that, in connection with the plaintiff herein, he continued to prosecute them to a final conclusion, while in a subsequent portion of the same finding the court found that there had not been a full and complete or substantial performance of that agreement. It was also said in the opinion that the appellant "was entitled to an unequivocal finding on the question of performance." Upon the subsequent trial of the cause, from which the present appeal is taken, the court finds that "the said contract was not fully or substantially performed by the said Hartman, nor did the said Hartman procure to be issued the patent for the said rancho," and it also finds as a fact that after the case was sent on to Washington, in 1871, Hartman rendered no services, but abandoned the case. As there was evidence before the court in support of these findings, the findings themselves must be accepted in this court as forming the basis of the judgment, irrespective of any conflict or preponderance of evidence upon which they were made. It is, however, contended by the appellant that, as it was said in the opinion upon the former appeal, after determining that the finding was ambiguous and uncertain, that "if, however, the finding can be construed as a finding in favor of respondent on that subject, it is sufficient to say that in our opinion it is not supported by the evidence," and, as the evidence at the last trial was substantially the same, the opinion upon the former appeal has become the law of the case, and that the trial court should have made its finding in conformity thereto.

The determination by this court of the rights of the parties in an appeal from the superior court is a final adjudication of those rights, and the questions of law decided by this court become a rule for the guidance of the trial court as well as of this court if the same questions are again presented in that controversy upon a retrial of the issues or upon a subsequent appeal. The principle upon which this rule rests is that the judgment is an estoppel binding upon the parties and to be enforced by the court: *Klauber v. Car Co.*, 98 Cal. 105, 32 Pac. 876. The rule is not limited to contro-

verted questions of abstract law, but is equally applicable when the point determined upon the appeal is whether the evidence before the trial court was sufficient to justify a decision drawn therefrom, which confers or withholds a legal right for either party. As the principle upon which this rule rests is that of an estoppel by judgment, it follows that it is only the matters which are actually adjudged or determined as the basis of the judgment of this court that can be considered as the law of the case, and binding upon the parties in its subsequent stages, and that when the judgment or determination is made upon a certain state of facts, it ceases to be of binding force if the facts presented at the retrial or upon a subsequent appeal are essentially different. The ground upon which the former judgment of this court was rendered was the failure of the trial court to make a finding upon this issue, and the statement in the opinion that the finding which it had made was ambiguous and uncertain rendered what was subsequently said about the insufficiency of the evidence to support the construction placed upon it by the respondent in his argument merely obiter. As the court had not made a finding upon the issue, there could be no basis for this court to make a determination respecting the sufficiency of the evidence to support that finding. It has been often held that when the trial court has failed to make a finding upon an issue in the case, although the entire evidence is before this court, we have no power to make a finding therefrom, but must remand the cause to the trial court for that purpose; that the act of drawing a conclusion from the evidence is peculiarly the function of the trial court, and that this court, in the exercise of its appellate jurisdiction, has power to correct only errors of law, and cannot correct errors of fact committed by that court. The same principles preclude any opinion which this court may give upon the character of the finding which should be drawn from the evidence in a case from having any binding force upon the trial court to which the case should be remanded, or in the determination of any subsequent appeal: See *Wixson v. Devine*, 80 Cal. 385, 22 Pac. 224.

The record, as presented upon this appeal, contains findings of certain facts which were not made at the former trial, and which, of course, could not have been considered by this court on the former appeal. In addition to finding that the con-

tract was not fully or substantially performed by Hartman, the court also finds that, while he did render some services in the surveyor general's office in this state, yet after the case was sent to Washington, in the early part of the year 1871, "no further services were performed by the said Hartman, nor did he appear in the said proceeding before the commissioner of the land office or Secretary of the Interior, but the case was wholly abandoned by him"; and also that the employment of Denver by Olvera was after the abandonment of the case by Hartman, and that the patent was procured to be issued by Denver. The evidence before the court was ample to sustain findings, and as probative of these facts they are controlling in support of the ultimate fact found upon the issue of performance. It follows that the judgment and order must be affirmed, and it is so ordered.

We concur: Fitzgerald, J.; McFarland, J.

DE HAVEN.—I concur in the judgment.

LOS ANGELES FARMING AND MILLING COMPANY
v. HOFF et al.

No. 19,180; October 10, 1893.

34 Pac. 518.

Public Lands—Inclosure—Color of Title.—A Judicial Decree, followed by possession under a bona fide claim, is color of title, within the meaning of act of Congress of February 25, 1885, prohibiting inclosures of public lands unless under "claim or color of title made or acquired in good faith," and, such possession having lasted for twenty-five years, the holder can maintain ejectment against persons assuming to enter on the premises as being "public lands of the United States." *Cameron v. United States*, 148 U. S. 301, 13 Sup. Ct. 595, followed.

APPEAL from Superior Court, Los Angeles County;
Walter Van Dyke, Judge.

Ejectment by the Los Angeles Farming and Milling Company against Hoff and others. Judgment for plaintiff. Defendants appeal. Affirmed.

J. M. Dameron for appellants; Graves, O'Melveny & Shankland and Stephen M. White for respondent.

PER CURIAM.—This is an action of ejectment brought against the defendant Hoff and over one hundred others to recover possession of the south half of the San Fernando rancho in Los Angeles county. Upon the facts shown at the trial we think there can be no question as to the right of the plaintiff to recover in this action, and the question of error in the instructions becomes immaterial. The supreme court of the United States, in a recent decision, has construed the act of Congress of February 25, 1885, and in effect answered every proposition upon which the appellants rely herein. *Cameron v. United States*, 148 U. S. 301, 37 L. Ed. 459, 13 Sup. Ct. Rep. 595. The plaintiff has been in the possession, under sanction of a judicial decree, for about twenty-five years. Its claim has been made in good faith and under color of title, while the defendants are mere naked trespassers. The case comes squarely, therefore, within the decision above referred to, and requires no further consideration: See, also, *United States v. Brandestein*, 32 Fed. 740, 13 Saw. 64, and *Rourke v. McNally*, 98 Cal. 296, 33 Pac. 62. We find no error in the record. Judgment and order affirmed.

Ex Parte CARROLL.

No. 21,048; October 12, 1893.

34 Pac. 518.

Contempt.—A Commitment for Contempt of Court, in disobeying an order requiring the person committed to restore to the administrator of an estate in process of settlement money which he had obtained, as attorney for such administrator, by false pretenses, is void, where the judgment on which the commitment issued fails to show that he was in fact such attorney.

Petition in habeas corpus by John S. Carroll for the release of John F. Burris from custody on a commitment for contempt. Petition granted.

John S. Carroll in pro. per.

BEATTY, C. J.—This is a proceeding upon habeas corpus instituted by the petitioner, Carroll, on behalf of John F. Burris, who is alleged to be unlawfully restrained of his liberty. The return to the writ consists of nothing more than the commitment under which the prisoner is held, which recites certain proceedings on attachment for an alleged contempt of court. These recitals show that Burris obtained from the administratrix of an estate in progress of settlement in the superior court the sum of \$108 by false pretenses; that he was ordered by the court to restore the money, and, failing to do so, was committed to the custody of the sheriff, to be confined in jail until he obeyed the order. The authority of the court to make such an order is rested upon the suggestion that Burris was attorney for the administratrix, and obtained the money from her by abuse of his privileges as an officer of court. It may be that a court has the power to make such an order, and enforce it against an attorney by process of contempt, but there is nothing in the return to show that Burris was an attorney for the administratrix at the time he obtained the money in question, and therefore the order appears to be void. Leave has been asked, since the hearing and submission of the case, to amend the return by showing that the complaint in the contempt proceeding alleged that Burris was attorney for the administratrix. But, even if it were proper to allow such amendment at this time, it would not cure the defect, for the judgment of the court—copied in the commitment—nowhere finds that Burris was such attorney. It speaks of him merely as one John F. Burris, i. e., as an entire stranger to the probate proceedings, and as much beyond the jurisdiction of the superior court in attachment for contempt as any other stranger. In contempt cases the facts necessary to confer jurisdiction should not only be alleged, but found, and here they are not found in any form, specific or general. The prisoner is discharged.

PACKER et al. v. DORAY et al.

No. 18,105; October 14, 1893.

34 Pac. 628.

New Trial—Amendment of Notice.—Code of Civil Procedure, section 659, subdivision 4, provides that where a motion for a new trial is made on the minutes of the court, and errors of law are relied on, the notice of motion must specify the errors relied on, and “if the notice do not contain the specifications . . . the motion must be denied.” Held, that where the notice does not contain the required specification, it is radically defective, and cannot be amended by adding new specifications after the time for filing it has expired, and if it is so amended, by leave of the trial court, after such time has expired, the specifications will not be considered on appeal.

Quieting Title.—Where Defendant in an Action to Quiet Title Disclaims as to part of the land, it is not error for the court to dismiss the action as to such part, instead of giving plaintiff judgment therefor, as such judgment would be merely formal, under Code of Civil Procedure, section 739, which provides that “if the defendant in such action disclaims in his answer any interest or estate in the property . . . the plaintiff cannot recover costs.”

APPEAL from Superior Court, Sierra County; John Caldwell, Judge.

Action by W. S. Packer and others against Phil Doray and others to quiet title. From a judgment in favor of defendants, and from an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

J. M. Walling, Tirey L. Ford and Goodwin & Goodwin for appellants; F. D. Soward and Frank R. Wehe for respondents.

PER CURIAM.—This is an action to quiet the plaintiffs’ title to certain tailing mining claims, called the “Alturas Company’s Mining Claims,” situate in Slate creek, and partly in Sierra county and partly in Plumas county. The claims described extend up and down the creek about twenty-six thousand feet and contain an area of about one hundred and twelve acres. The defendants deny that the plaintiffs are, or

ever were, the owners or in possession of that portion of the claims described, commencing at the upper end thereof, and extending down the creek about ten thousand feet; and they allege that as to such portion of the claims they are, and were at the time of the commencement of the action, and long prior thereto, the owners, and in possession thereof; and, as to the balance of the claims described in the complaint, they disclaim having or claiming any estate or interest in or to the same. The case was tried by the court and the findings were that neither the plaintiffs, nor either of them, nor their grantors or predecessors, ever owned or possessed, or were entitled to the possession of, the mining ground described in the answers of defendants, and that at the time of the commencement of the action the defendants were the owners of, and in the actual possession of, all the mining ground described in their answers, and claimed by them. Judgment was accordingly entered that the plaintiffs take nothing, that their action be dismissed, and that defendants recover their costs. From this judgment and an order denying their motion for a new trial the plaintiffs appeal.

1. The principal contention of appellants is that the findings were not justified by the evidence, and hence that the judgment should be reversed and the cause remanded for a new trial. The evidence brought up in the transcript is evidently stated as briefly as possible, and still it covers about one hundred printed pages. It relates to sundry attempted locations; to the customs of miners; to work done on different portions of the ground, commencing as early as 1855; and to numerous transfers of interest claimed to have been acquired under such locations. To state the facts in detail would require much space, and subserve no useful purpose. In our opinion, it is enough to say that, while there was some conflict, there was evidence clearly tending to justify and support the findings, and hence that the judgment cannot be reversed on this ground.

2. It is urged that numerous errors of law were committed by the court during the progress of the trial which call for a reversal of the judgment. The notice of intention to move for a new trial stated that it would be made upon the minutes of the court, and it was so made. The notice specified the particulars in which the evidence was alleged to be insufficient

to justify the verdict, but contained no specifications of errors of law. Subsequently, and after the time for giving the notice had elapsed, the plaintiffs, by leave of the court, amended their notice by adding thereto specifications of the errors of law now complained of. The motion was denied, and thereafter a statement of the case was prepared and settled. Section 659, subdivision 4, of the Code of Civil Procedure, provides: "When the motion is to be made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and, if the ground of the motion be errors in law occurring at the trial and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain the specifications here indicated, when the motion is made on the minutes of the court, the motion must be denied." The notice given was radically defective, so far as regards the specifications of error, and after the time for filing it had elapsed the moving parties had no right to amend it by adding the new specifications: *Cooney v. Furlong*, 66 Cal. 520, 6 Pac. 388; *Little v. Jacks*, 67 Cal. 165, 7 Pac. 449. This being so, the alleged errors cannot be considered. If, however, it was otherwise, the same result must be reached, since we are unable to see any material error in the rulings complained of.

3. It is further urged that the plaintiffs were entitled to have their title quieted as to all that part of the premises described in their complaint in which the defendants disclaimed having any estate or interest, and that the court, therefore, erred in dismissing the action. Section 739 of the Code of Civil Procedure provides: "If the defendant in such action [action to quiet title] disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs." If, then, judgment had been entered, quieting the plaintiffs' title to the disclaimed portion of the ground, it would have been merely formal, and without costs. Under these circumstances, we fail to see that plaintiffs were aggrieved by the judgment entered. The judgment and order are affirmed.

CHAPIN et al. v. BROWN.*

No. 18,147; October 14, 1893.

34 Pac. 525.

Partnership—Accounting—Novation.—A Lumber Firm Agreed with two of its members to sell them sawed lumber at a certain price. The two members formed a new firm, and one of them sold his interest in the contract to the other, and the latter sold interests therein to two strangers. The old firm continued to sell to the purchasing concern under the agreement, and to receive payment therefrom, without regard to its personnel, the bills being in all instances made out in the name of the purchasing concern. There was no evidence of any agreement to release the original contractors. Held, that there was no novation, and the lumber firm could sue one of the purchasing members for an accounting without joining his new associates in the purchasing contract.

APPEAL from Superior Court, Fresno County; M. K. Harris, Judge.

Action by J. E. Chapin, T. E. Peckinpagh and Charles Peckinpagh against Albert Brown for an accounting. Judgment for plaintiffs. Defendant appeals. Affirmed.

R. P. Davidson for appellant; J. R. Webb and L. L. Cory for respondents.

VANCLIEF, C.—On August 15, 1887, the plaintiffs and the defendant were copartners doing business in the firm name of Sugar Pine Mill and Lumber Company. Their business was that of manufacturing and selling lumber. They owned one hundred and sixty acres of timber land, upon or near which they had built a sawmill. On August 15, 1887, a written contract between the copartnership and two of its individual members, namely, Chapin and the defendant Brown, was executed, by which the copartnership agreed to sell to Chapin and Brown, and the latter agreed to purchase, all the lumber to be sawed from the timber then standing or fallen on the said one hundred and sixty acres of land, “or that may be sawed in the mill of the said parties of the first

*For subsequent opinion in bank, see 101 Cal. 500, 35 Pac. 1051.

part [the copartnership] from other claims before finishing sawing the timber from the above-described claim [the one hundred and sixty acres] " at the price of \$9 per thousand feet, to be delivered in the mill-yard. The parties of the first part further agreed that after the year 1887 they would deliver, as aforesaid, "an annual amount of one million feet or more, at the option of the said second parties." The agreement contains other stipulations not relevant to the issues in this case. On the same day (August 15, 1887) another agreement was executed between the copartnership and two others of its members, namely, T. E. Peckinpagh and Charles Peckinpagh, by which the latter agreed to cut, haul, and saw into lumber all the timber on said one hundred and sixty acres of land, and to stack the lumber in said mill-yard, for which they were to be paid \$6 per thousand feet. As to the amount of lumber to be sawed, they agreed to be governed by the above-mentioned contract with Chapin and Brown. For the purpose of performing this contract they were to have the use of said mill, but were to keep it in repair. This contract also contains matters not material to this case. Chapin and Brown assumed to constitute a distinct copartnership under the firm name of North Fork Lumber Company, and transacted the business under their contract with the Sugar Pine Mill and Lumber Company in that name; but at some time prior to January 1, 1888, Chapin assigned his interest in their contract with the Sugar Pine Mill and Lumber Company to Brown, who agreed with him to perform all its obligations, and withdrew from the North Fork Lumber Company. Brown continued the business under the contract in the name of North Fork Lumber Company until January, 1888, when he assigned an interest in the contract to John Bartram, and on May 1, 1888, assigned another interest to B. F. Ellis. After these assignments, Brown, Bartram and Ellis constituted the North Fork Lumber Company, and conducted the business with the Sugar Pine Mill and Lumber Company under the lumber contract in that name. In the fall of 1888, T. E. and Charles Peckinpagh assigned their contract with the Sugar Pine Mill and Lumber Company of August 15, 1887 (above set out), to the North Fork Lumber Company. By the performance of this contract on the part of the Peckinpaghs, the North Fork Lumber Company became entitled to receive from the Sugar

Pine Mill and Lumber Company \$6 per thousand feet for manufacturing the lumber which they were to purchase from the latter company at the price of \$9 per thousand. From and after this assignment by the Peckinpaghs, Charles Peckinpagh was employed by the North Fork Lumber Company, at a salary, to do the sawing, and he continued in that position during the years 1890 and 1891.

The object of this action is to dissolve the Sugar Pine Mill and Lumber Company, to compel an accounting between its members, and especially between the copartnership and the defendant, who, it is alleged, owes the concern a balance of \$3,090 for lumber delivered to the North Fork Lumber Company during the year 1890, under the contract first above mentioned, called the "purchasing contract." The court found him to be individually responsible on that contract, and that he was indebted on that account to the other members of the company as follows: To Charles Peckinpagh, \$427.45; to T. E. Peckinpagh, \$471.85; to J. E. Chapin, \$483.80—amounting to \$1,383.18; and consequently that he was indebted to the copartnership (of which he was an equal member) in the sum of \$1,844.14. The judgment was in accordance with this finding. The defendant appeals from the judgment and from an order denying his motion for a new trial.

1. The appellant contends that there was a novation of the purchasing contract by which the assignees of portions thereof were substituted for the original contractors (Brown and Chapin) by consent of the Sugar Pine Mill and Lumber Company, and therefore that appellant is not individually liable, as found by the court. It is not claimed, however, that there was any evidence of such novation, or consent thereto, by the Sugar Pine Mill and Lumber Company, other than the facts that the lumber was delivered to and paid for (so far as payments were made) by the North Fork Lumber Company, as constituted at the times of such delivery and payments. Brown never assigned all his interest in the purchasing contract, but remained a member of the North Fork Lumber Company during all its transactions with the Sugar Pine Mill and Lumber Company. Nor is there any evidence that the latter company ever agreed or consented to discharge him or Chapin from their obligation on that contract, to accept Bartram or Ellis in their stead for any part of such obligation. No objec-

tion on the ground of misjoinder or nonjoinder of parties to the action was made by demurrer or answer, or otherwise, in the court below, nor is any point made here on this ground. All the parties to the purchasing contract and all the members of the Sugar Pine Mill and Lumber Company were before the court, and, as there is no novation of that contract, neither Bartram nor Ellis was a necessary party to the accounting. The state of accounts between the members of the North Fork Lumber Company is immaterial for any purpose of this action.

2. The only other point requiring consideration arises on the following additional facts: During the year 1890, while Charles Peckinpagh was doing the sawing for the North Fork Lumber Company, as aforesaid, he and a Mrs. Bearden sold and delivered to the North Fork Lumber Company a lot of logs cut from other lands than the one hundred and sixty acres belonging to the Sugar Pine Mill and Lumber Company, and to which the latter company held no title. These logs were sawed by Charles Peckinpagh during 1890, while employed by the North Fork Lumber Company, as aforesaid, and produced 683,923 feet of lumber, which was piled in the mill-yard, and thence removed by the North Fork Lumber Company. The evidence tends to prove that these logs were sawed with the knowledge and consent of the plaintiffs, and with an understanding between plaintiffs and the North Fork Lumber Company that the latter was to pay the Sugar Pine Mill and Lumber Company, for the use of their mill in sawing those logs, fifty cents per thousand feet; and it appears that a large portion of the lumber sawed from those logs must have entered into the estimate of the 1,030,000 feet alleged and found to have been delivered to defendant in 1890, under the contract set out in the complaint. The appellant contends that the lumber produced from those logs purchased by the North Fork Lumber Company never was the property of the Sugar Pine Mill and Lumber Company, and therefore could not have been sold or delivered as such, under the contract set out in the complaint, and that the Sugar Pine Mill and Lumber Company were entitled to charge only for the use of the mill in sawing those logs at the agreed price of fifty cents per thousand instead of \$3 per thousand, which they were to receive for the lumber sawed from timber taken from the land of the Sugar Pine Mill and Lumber Company. Thus

far, perhaps, appellant is right, but his assumption that in the accounting the court credited the Sugar Pine Mill and Lumber Company \$3 per thousand for the lumber sawed from the logs purchased by the North Fork Lumber Company is not sustained by the record. Assuming that all the lumber sawed before January 1, 1890, had been paid for before the commencement of this action, as seems to be admitted, and that only the lumber sawed in 1890 and 1891 is involved, as appears by the findings of the court, and also assuming that only fifty cents per thousand was credited to the Sugar Pine Mill and Lumber Company on account of the 683,923 feet produced from the logs purchased by the North Fork Lumber Company, and \$3 per thousand for all the lumber sawed from other timber during 1890 and 1891, viz., 735,121 feet, yet the judgment against the defendant would seem to be considerably less than it should have been. The 735,121 feet sawed from other timber than logs purchased by the North Fork Lumber Company, at \$3 per thousand, would amount to \$2,205. Deduct from this one-fourth thereof for defendant's share, and the remainder due the other three partners is \$1,654, whereas only \$1,383.18 was allowed them by the court. This result is justified by the fact that the accounting was not confined to the year 1890, during which the logs purchased by the North Fork Lumber Company were sawed, but included, without objection, the 389,044 feet of lumber produced from other timber during 1891. It may be that the defendant was properly credited with payments or setoffs not shown by the record, which accounts for this result. However this may be, it is enough for the disposition of this appeal that the record shows no error prejudicial to the appellant. I think the judgment and order should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

WILLIAMS v. BISAGNO et al.

No. 14,271; October 18, 1893.

34 Pac. 640.

Street Assessments.—A Resolution to Pave and Curb a Street required the city engineer to furnish the council with estimates. The estimates, in addition to the items of paving and curbing, stated, under the head of "grading," that sixty-six cubic yards of excavation and forty-two cubic yards of embankment would be required. The grading, if taken from the entire surface of the street, would involve the removal of one and five-sevenths inches in depth. Held, that it would be assumed, from the small amount of the so-called "grading" required, that the street had been graded, and that the grading mentioned in the estimates was merely the removal of small inequalities in the surface, and therefore an assessment for the paving and curbing was not invalid on the ground that it required grading, which was not mentioned in the resolution.

Street Assessment.—A Recital in the Record on Appeal by defendant, in an action to enforce a street assessment, that plaintiff produced two witnesses who testified that the notice of the improvement "was posted at the time and in the manner required by law, both as to the number of said notices, the place of posting, and the time during which the same remained posted," sufficiently shows that the law as to posting the notice was complied with.

Street Assessment.—A Resolution to Pave a Street, Which Refers by number to certain ordinances for the manner in which the work is to be done, is sufficient, without reciting the provisions of the ordinance.

APPEAL from Superior Court, City and County of San Francisco; J. R. Swinnerton, Judge.

Action by C. B. Williams, administrator of J. E. Magary, deceased—substituted as plaintiff in place of his intestate—against A. Bisagno and others, to enforce a street assessment. There was a judgment in favor of plaintiff, and defendants appeal. Affirmed.

Craig & Meredith for appellants; Jas. H. Budd for respondent.

HAYNES, C.—This action was brought by Magary against the appellants to enforce a street assessment. He obtained

judgment in the superior court, and defendants appeal from the judgment, and an order denying their motion for a new trial. After the appeal was taken, Magary died, and his administrator, C. B. Williams, was substituted in this court. Upon their motion for a new trial, appellants specified three particulars in which they claimed the evidence was insufficient to justify the decision, namely: (1) It appeared from the evidence that the plans and specifications were not in accordance with the resolution of intention, in that they included grading, which work was not included in said resolution of intention. (2) The contract embraced work not within said resolution of intention, namely, the grading of said street. (3) The notice of said work, as posted, did not comply with the law, in that the letters were not an inch long, and said notice was not posted in two or more places. The only error of law specified is that "the court should have decided in favor of defendants."

The resolution of intention was to order Washington street paved with basalt blocks of the dimensions required by ordinance No. 239 of the ordinances of the city of Stockton, for the entire width of the roadway from one designated point to another, and to order curbing of granite rock, of the dimensions required by another designated ordinance, along the outside of the sidewalks, on both sides of the same street, between the same terminal points. By a resolution of the council, the city engineer was required to furnish the council with plans and specifications, and careful estimates of the cost and expense, of said paving, and of the curbing. This resolution was complied with. The engineer reported, under the head "grading," the following: "There will be a total of sixty-six cubic yards of excavation and forty-two cubic yards of embankment. The embankment must be made from the excavation, and the entire work must be rolled at least twice with the city roller before placing sand upon it." After fully describing the manner in which the paving and curbing should be done, the "estimate of cost" was given as follows:

13,465 square feet of paving at \$.25	\$3,366 25
606 running feet of curbing at \$1.00	606 00

\$3,972 25

These plans and specifications and estimates were approved by the council, and were incorporated in the contract for the work. No estimate was made for grading, nor was any bid made therefor, except as included in the bid for paving, and the assessment and warrant were for paving and curbing. It is clear from the record that the grading mentioned in the specifications was treated throughout as incidental to, and part of, the paving. The grading involved a removal, if taken from the entire surface, of one and five-sevenths inches in depth, or, as the specifications show, an excess of twenty-four yards over what was required to fill the slight inequalities of the street. Such work is obviously incidental to the paving, as much so as putting on the three inches of sand required as a basis for the basalt blocks, and was within the work specified in the resolution of intention. The ordinance providing for the manner in which the paving shall be done is not set out, either in the transcript or briefs, nor is there anything in the record to show that the street had not been graded. We think it may therefore be assumed, not only from the silence of the record, but from the small amount of the so-called "grading," that the street had been graded; that the work denominated "grading" in the specifications was merely the removal of inequalities resulting from the use of the street after it was graded, and that the ordinance prescribing the mode or manner of paving provided for the removal of such inequalities as part of the work of paving; that the character of this work did not come within the meaning of the word "graded," as used in the second section of the act, and was used by the engineer only in the sense of being a necessary part of the work of paving, for which a separate estimate was not only unnecessary, but improper. The resolution directed the engineer to make plans, specifications and estimates "of the cost and expense of paving with basalt blocks," and, the estimate not having included "grading," both the engineer, in making his report, and the council, in approving it, must have understood the grading as part of the paving, and within the ordinance upon the subject of paving. *Dyer v. Chase*, 52 Cal. 440, and *Donnelly v. Howard*, 60 Cal. 291, cited by appellants, are not in point. In *Dyer v. Chase* the resolution of intention was to curb and macadamize a street. The contract and assessment included macadamizing the sidewalk. And in *Don-*

nelly v. Howard a reference to the record shows that the assessment included "curbing," which was not included or referred to in the resolution of intention. It may be, as appellants contend, that the grading increased the bid for paving, but, as the paving could not be done without the prior preparation of the street, such preparation is properly included.

The contention that the "notice of street work" did not comply with the statute, in that the letters should have been "an inch in length along the line," instead of vertically, requires little notice. The object of the statute is to have the headline of the posted notices, consisting of the words, "Notice of Street Work," so prominent as to attract attention, and so distinct as to be easily read at a reasonable distance. A copy of the headline of the notice, as posted, is inserted in the transcript. The letters are more than an inch in length, vertically, and of reasonable proportion, and are sufficiently distinct. The sole purpose of the statutory provision having been fully accomplished, as well as literally complied with, a discussion of the question is unnecessary.

As to the point that it is not shown that more than one notice of "street work" was posted, the transcript contains the following: "The plaintiff thereupon produced two witnesses, who testified, in substance and effect, that the said notice was posted at the time and in the manner required by law, both as to the number of said notices, the place of posting, and the time during which the same remained posted." This condensed statement of the evidence upon this point, made by appellants in their statement on motion for a new trial, is, we think, conclusive that the law was complied with in that regard. At the least, it does not appear from the record that the requisite number of notices was not posted.

Appellants make the further point in their brief that the resolution of intention was not sufficient, inasmuch as it referred to ordinances 239 and 334, instead of reciting the provisions of those ordinances, and cite in support of their contention *Crosby v. Dowd*, 61 Cal. 558, to the effect that a decree foreclosing a mortgage must be, in itself, sufficient, without referring to other records. That case was, however, overruled in *De Sepulveda v. Baugh*, 74 Cal. 468, 5 Am. St. Rep. 455, 16 Pac. 223; *In re Madera Irr. Dist.*, 92 Cal. 329, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675. The question here,

however, is different. In *Crosby v. Dowd* the question was whether a decree was not void which purported to enforce a lien upon property not described in the decree itself, and which could only be identified, if at all, by reference to conveyances on record. Here the reference is to ordinances showing the manner in which the work is to be done, and of which appellants were not only bound to take notice, but were conclusively presumed to have knowledge. Finding no error in the record, we advise that the judgment and order appealed from be affirmed.

We concur: Vanelief, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be affirmed.

Ex Parte BELL.

October 18, 1893.

34 Pac. 641.

Larceny—Jurisdiction of Superior Court.—Where a defendant is convicted in the superior court of petit larceny, on an information which charges him with grand larceny, he may be confined in the county jail under such conviction, though the superior court has no jurisdiction of petit larceny, since the charge of grand larceny gave the court jurisdiction, and Penal Code, section 1159, authorizes a conviction of petit larceny when grand larceny is charged.

Application by Charles Bell for a writ of habeas corpus, alleging that he was illegally imprisoned under a conviction of petit larceny. Denied.

P. E. & Robt. A. King for petitioner.

PER CURIAM.—The petitioner was accused by information of the crime of grand larceny, and, after a trial in the superior court, convicted of petit larceny. His imprisonment in the county jail upon that conviction is alleged to be unlawful, because the superior court has no jurisdiction of petit larceny.

But the charge of grand larceny gave the superior court jurisdiction, and the statute authorizes a conviction of petit larceny, when grand larceny is charged: Pen. Code, sec. 1159. Writ denied.

WAGNER v. SUPERIOR COURT OF LOS ANGELES
COUNTY.*

No. 15,506; October 27, 1893.

34 Pac. 648.

Insolvency—Proceeding to Vacate Discharge.—Where a person has been discharged in insolvency, the court has no jurisdiction to hear a petition by his assignee to annul the certificate of discharge, since, under insolvent act 1880, section 53, providing that “any creditor” of an insolvent debtor who has obtained such discharge may contest its validity on the ground that it was fraudulently obtained, such a proceeding can only be commenced by a creditor.

Petition by L. M. Wagner for a writ of prohibition to restrain the superior court of Los Angeles county from proceeding under an order made by it directing petitioner to appear and show cause why an order made on a petition for insolvency discharging her from her debts should not be vacated. Writ granted.

W. H. Pollard for petitioner; Mr. Graff for respondent.

PER CURIAM.—Application for a writ of prohibition. It appears that on September 28, 1892, the petitioner, L. M. Wagner, was adjudged insolvent by the superior court of Los Angeles, and subsequently the court, in the matter of the insolvency proceeding, made a distribution of all of the estate of the insolvent which had come into the possession of the assignee, and granted to the petitioner here a certificate of discharge from all debts and claims existing against her at the date of the filing of her petition to be adjudged insolvent, and also made an order discharging the assignee. When these orders were made, the insolvency proceedings were ended, and

*For subsequent opinion in bank, see 100 Cal. 359, 34 Pac. 820.

the court had no further jurisdiction over the person of the insolvent, and this jurisdiction could only be restored by an application upon the part of some creditor of the insolvent to set aside and annul the decree or certificate discharging her from her indebtedness, as provided by section 53 of the insolvent act. Certainly, after the insolvency proceeding was thus ended, the court was without authority to proceed under either section 24 or section 47 of the insolvent act, and examine the petitioner here, or other persons, for the purpose of ascertaining whether or not all the property of the insolvent estate had come into the hands of the assignee. It seems, however, that since the making of the orders referred to, two petitions have been filed in the superior court, each praying that the certificate of discharge granted to the petitioner herein be annulled upon the ground of alleged fraud in obtaining it. One of these petitions was filed by the assignee in the insolvency proceeding and the other by a creditor of the insolvent Wagner. The court thereupon made an order requiring the petitioner herein to appear on October 30, 1893, and show cause why the order discharging her from her indebtedness should not be vacated, and upon the same day, upon application of the assignee, the court made an order requiring the petitioner here to appear before the court upon a day named for examination in relation to her property, and also directed that subpoenas should issue requiring the attendance as witnesses of other persons claiming to own such property. The object of this proceeding is to prohibit the court from proceeding under this latter order. We think the application must be granted. The court is without any jurisdiction to hear the petition of the assignee, asking that the certificate of discharge be annulled. Such a proceeding can only be commenced by a creditor of the insolvent: Insolvent Act, sec. 53; *Sanborn v. Doe*, 92 Cal. 152, 27 Am. St. Rep. 101, 28 Pac. 105. The order under which the court is proceeding seems to be based upon this petition, and is void. In the matter of the petition filed by the creditor, the petitioner and the other persons named in the order may be required to give their depositions under section 2021 of the Code of Civil Procedure, or to appear in open court and give their testimony upon the issues arising upon such petition and the answer thereto. Let the writ of prohibition issue.

HECKMAN v. SWETT et al.

No. 14,999; August 16, 1893.

33 Pac. 1099.

Islands—Boundaries.—Act of April 28, 1855, to Provide for the sale of the swamp and overflowed state lands (section 18), limits the provisions of the act to the swamp lands granted to the state by act of Congress, September 28, 1850, under which lands owned by the state by virtue of its sovereignty, including the beds and shores of navigable streams below high-water mark, could not be sold or conveyed. Held, that patents of certain surveys of such swamp lands on Eel river, issued after the channel in such river was changed by a freshet, which described the lands as bounded on such river, conveyed to the grantees the land to high-water mark only, according to the new channel, and did not convey any part of an island formed on the opposite side of such channel by the change, though part of such island is within the lines of the original surveys made prior to such change.

Islands—To Whom Belong.—Where Such Island Does not Consist of part of such original surveys left intact by the change in the channel, but was formed of deposits within the lines of such surveys, the island is the property of the state, under Civil Code, section 1016, which provides that islands and accumulations of land, formed in the beds of navigable streams, belong to the state, if there is no title or prescription to the contrary.

Island—Right to Fishing Privilege.—Statutes of 1859, page 298, entitled "An act to regulate salmon fisheries on Eel river in Humboldt county" (section 2), provides that the owners of land fronting such river shall have exclusive right and privilege of casting, hauling and landing seines and nets on their own waterfronts; and, for the purposes of this act, all bars and the bed of such river lying between the lines of the official survey and extreme low-water mark shall be deemed and held to be the waterfront of the land owner whose lines border on such river or run nearest thereto. Held, that where the bed of such old channel is above low-water mark, but below high-water mark, the owner of the land separated from such island by the old channel has the exclusive right to the fishing privilege on such island.¹

¹ Cited, with other cases, in *State v. Mallory*, 73 Ark. 247, 67 L. R. A. 773, 83 S. W. 959, in support of the court's holding that the owner of land has, by virtue of being such, a special property right to take fish and wild game on the land so owned subject only to the state's right and ownership maintained to regulate and preserve game for the common benefit.

Island—Right to Fishing Privilege.—Since the Owners of the Land separated from the island by the new channel owned no part of the island, they could acquire no right to the fishing privilege by adverse possession of such island, since such privilege is a right which attaches to the ownership of the land on the opposite side of the old channel, and can be acquired only by obtaining title to such land.

Fishing Privilege—Acquisition by Adverse Possession.—Under Statutes of 1859, page 298, section 5, which declares that any person who shall cast, haul or draw any seine or net, not having the right to do so, shall be deemed a trespasser, and may be convicted of a misdemeanor, a person cannot acquire a fishing privilege by adverse possession, since the violation of a penal statute, no matter how long continued, cannot confer a legal right.

APPEAL from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Ezekiel M. Heckman against John A. Swett and others to quiet title to a fishing privilege and for an injunction. From a judgment for defendants, plaintiff appeals. Reversed.

Horace L. Smith for appellant; P. F. Hart and E. W. Wilson for respondents.

HAYNES, C.—Action to quiet title to a fishing privilege, and for an injunction. Findings and judgments were in favor of defendants, and the plaintiff appeals from the judgment upon the judgment-roll and a bill of exceptions. Plaintiff is the owner of certain lands on the north side of Eel river, known as "Swamp Land Survey No. 45," patented by the state to plaintiff's grantor in 1882. Defendants are owners, severally, of lots 36 and 42, swamp land surveys, which lots were surveyed in April, 1858. Lot 36 was patented in 1871, and lot 42 in 1880. At the time of the survey these lots were wholly on the south side of Eel river, a navigable river in which the tide ebbs and flows, and were described in the surveys and patents as bounded on that river, the courses and distances, including the meander lines on the river and navigable sloughs, and the number of acres, being also given. The court, after finding the foregoing facts, made the following finding: "(4) That Eel river is a navigable stream, and in which the tide ebbs and flows daily; that, at the date of the

said several surveys, applications and purchases as aforesaid, of said lands particularly set forth and described in findings 1, 2 and 3, the said Eel river bounded the said lands of plaintiff particularly described and set forth in said finding 1 upon the south side thereof, and the said lands of the said defendants particularly described and set forth in said findings 2 and 3 upon the north side thereof; that in the winter of 1861 and 1862 there occurred a sudden, unusual and excessive rise or freshet in the waters of said Eel river, and during which a large portion of the said lands hereinbefore, in findings 2 and 3, particularly described and set forth, with other lands along said river, were submerged or covered with water; that said rise or freshet continued for several days, and during its continuance a very considerable part of the most northern portion of the said lands described and set forth in said findings 2 and 3 as aforesaid was cut, washed and carried away; that such cutting, washing and carrying away was not slow, gradual and imperceptible in its progress, but, upon the contrary, the same was rapid, sudden and perceptible, and its loss could be plainly seen and perceived; that blocks or masses of earth caved off this land, and fell into the river, and were washed and carried away; that houses and outbuildings thereon were also washed and carried away with the land, so rapid was the same done; that said rise or freshet continued for several days; and that, upon the subsidence in the waters of said Eel river, the same was found to have cut for itself a new channel, and the main channel thereof was then running about a quarter of a mile south of the old channel, and through and over the lands of said defendants hereinbefore, in said findings 2 and 3, particularly described and set forth, whereby a portion of said lands thus described were left upon the south bank of Eel river as thus changed, and a portion thereof upon the north bank of said river as thus changed, thereby forming a small island which has grown gradually and imperceptibly, but mostly downstream, until it is now nearly a quarter of a mile wide, and a little more than a quarter of a mile long, and lies between the old or original channel of Eel river and the new channel as thus formed." The court further found that the main body of the water has ever since flowed in the new channel; that the tide ebbs and flows through the old channel; that at high tide there are

from two to six feet of water therein, and a width of one hundred to one hundred and fifty feet; that at low tide the bed of the old channel is dry for a considerable distance between plaintiff's land and the island; that the island is about the level of the lands on either side of the river, and is not covered with water except during freshets; that by reason of the change in the channel plaintiff's lands do not front upon or extend down to the river as thus changed, but since said freshet of 1861-62 are separated from the river by the lands in controversy and by said old channel. The southerly shore of the island is suitable for landing nets, and is valuable for fishing purposes, while the bank on the south side of the present channel is abrupt, and cannot be used for that purpose; and these facts give rise to the present controversy.

An act to regulate salmon fisheries on Eel river in Humboldt county (Stats. 1859, p. 298) contains the following provisions: "Sec. 2. The owners of land fronting on the above-named river shall have exclusive right and privilege of casting, hauling, and landing seines and nets on their own waterfront. For the purposes of this act, all bars and the bed of said river lying between the lines of the official survey and extreme low-water mark shall be deemed and held to be the waterfront of the land owner whose lines border on said river or run nearest thereto. Sec. 3. Where there is a bar or grade suitable for landing seines or nets on one side of the river, and a bold shore and steep, abrupt bank on the other, the owner or owners of the land embracing such bar or grade shall have the exclusive privilege of using the entire width of the river for fishing purposes at such points or places; provided always that such owner or owners shall in no wise impede or interfere with the navigation of said river. Sec. 4. Whenever on both sides of said river there is a bar or grade suitable for landing seines or nets, the owners of the land on each side of said river embracing such bars or grades shall exercise fishing privileges and rights to the center of the river at low-water mark."

Plaintiff contends that there are no private lands between his land which reaches high-water mark on the north side of the river and low-water mark on the south side of the island, and that, therefore, under the provisions of the statute above quoted, he has the exclusive right of the fishery on the south

shore of the island; while defendants claim that, by the change of the channel of the river, the southern shore of the island is within the lines of the original survey of their lots, and covered by their patents; that thereby plaintiff is excluded; and that they have the exclusive right. The island is not used by either party for any other purpose. If defendants have title under their patents, their right is clear. If they have not, plaintiff's right is clear, unless he is barred by adverse possession. We think defendants' patents only conveyed to them the lands lying south of the present channel, and did not convey any part of the island. These lands were surveyed under the act of April 28, 1855, entitled "An act to provide for the sale of the swamp and overflowed lands belonging to this state" (Stats. 1855, p. 189). By the eighteenth section the provisions of the act were limited to the swamp lands granted to the state by the act of Congress of September 28, 1850, and under that act lands owned by the state by virtue of its sovereignty, including the beds and shores of navigable streams below high-water mark, could not be sold or conveyed. The patents describe the lands conveyed as swamp land granted to the state by said act of Congress, and describe defendants' lands (lots 36 and 42) as bounded by the left or southern bank of the river. The fact that the surveys start at a point on a section or quarter section line back from the river, and give the courses and distances of all the lines, including the meander lines, along navigable sloughs and the bank of the river, does not control the call for the south bank of the stream. Such survey was necessary in order to ascertain the number of acres contained in each lot. Though both these surveys were made, and the patent to lot 36 was issued, before the adoption of the code, the law in relation to boundaries upon navigable streams was the same as it now is. "A conveyance by the state of lands bounding upon the sea, or upon a bay or navigable stream, would extend to high-water mark": *People v. Morrill*, 26 Cal. 357; Civ. Code, sec. 830; *Packer v. Bird*, 71 Cal. 134, 11 Pac. 873. If defendants' contention can be sustained, it would seem to follow that under their patents they have not only acquired title to the bed of the river, but to the water which covers it: *People v. Canal Appraisers*, 33 N. Y. 464. The courses and distances of the survey undoubtedly include

a section of the river lying between the side lines of the survey, and these courses and distances must be resorted to if any part of the island is included. But not only does the call for a navigable river as a boundary control the calls by courses and distances, but the state could not convey under the act for the sale of swamp lands any land lying below ordinary high-water mark on a navigable stream, nor can the state, under any act that the legislature could enact, convey an absolute and unqualified title to the shore or bed of a navigable stream. Such lands are held by the state in trust for the whole people, and cannot be conveyed for any purpose not consistent with and in furtherance of the purposes of the trust. Grants may be made for the erection of wharves, docks, etc., in aid of the use of the water for purposes of navigation and commerce, "but the state cannot abdicate its trust over property in which the whole people are interested": *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 453, 13 Sup. Ct. Rep. 110. If the state can vest absolute and unqualified title and ownership of any portion of such lands and waters in a private person, there can be no limit to such disposals until all such lands have been converted into private property, and the trust for the benefit of the public has been utterly destroyed. For these reasons, if no other, respondents' contention that the curative act of March 27, 1872 (*Stats.* 1871-72, p. 587), "vests in the respondents the legal title to the land embraced within their patents," cannot be sustained, if by the language just quoted counsel mean, as they evidently do, the lands embraced within the courses and distances there given. The patents conveyed to high-water mark on the southerly bank of the river as it existed at the date of the patent, or as thereafter changed by washing or cutting away by the action of the water, or by accretions added by the same agency. By apt words in the patents, they might have been made to include a portion of the island above high-water mark, but those words were not used, and we cannot supply them. What would have been the effect of the change in the channel of the river caused by the freshet of 1861-62 if the title had vested in the defendants prior to such change it is not necessary to determine. These surveys were made April 20, 1858. On April 21, 1858, the act of 1855 was repealed, reserving rights accrued thereunder. The

act of 1858 made the certificate of purchase issued by the register prima facie evidence of title. The certificates of purchase of lots 36 and 42 were issued, as shown by the patents, January 26, 1871, and April 28, 1880, respectively, and the patents were issued shortly thereafter; and section 7 of the act of 1858 expressly provided "that neither the patent provided for in this section, nor the certificate provided for in the sixth section of this act, shall have any other legal effect or force than as a quitclaim of all right, title, and interest on the part of the state"; but this quitclaim can only operate to transfer title to that which passes by the controlling calls of those instruments. We do not understand the fourth finding to state that a new channel was cut through lots 36 and 42, leaving a part of those lots intact upon the north side of the new channel, but that the channel was changed by cutting away the south bank until it reached its present location; and that part of the finding which states that a portion of these lots was left upon the north bank only means that a portion of the deposit forming the island is within the lines of the survey. If this finding is not to be so understood, it is not justified by the evidence. The island thus formed belongs to the state: Civ. Code, sec. 1016. We conclude, therefore, that plaintiff's southerly line is high-water mark on the north side of the river, which includes the old channel, and defendants' northerly line is high-water mark on the south side of the river; that the island is the property of the state; and that, as the old channel is above low-water mark, the low-water line is on the south side of the island in front of plaintiff's land, while the high-water line on the north side of the old channel is the south line of plaintiff's land, which brings him within the provisions of section 2 of the act regulating fisheries on Eel river. Nor does the plaintiff attack defendants' patents collaterally, as contended by counsel for respondents, nor attack them at all. They are conceded to be valid, and to vest in defendants title to all the land described within their controlling calls. The attack is only upon the construction sought to be placed upon them, viz., that they vested title in the defendants to a portion of the island.

The only remaining question is as to adverse possession. Upon this defense the court found that the defendants had

severally occupied and used the south shore of the island for fishing purposes exclusively, openly, and under a claim of title, for more than five years next before the commencement of the action, and that the plaintiff had not been seised or possessed of any right thereon or attached thereto within five years, or at all. Having concluded that defendants owned no part of the island, we think it must follow that they could acquire no right to the fishery by adverse possession under the facts of that possession as found by the court. The second section of the act of 1859, regulating fisheries on Eel river, grants the exclusive right to the owner of land fronting on the river. It is a right which attaches to the ownership of land as an appurtenance which passes with a conveyance of the land. If defendants had acquired title to plaintiff's land on the north side of the river by adverse possession, they would at the same time and by such acquisition of the land have also acquired the fishery, whether they had used the fishery during the period of adverse possession of the land or not. Navigable streams and the shores to ordinary high-water mark, as we have seen, are held by the state in trust for the public; but qualified rights therein may be granted so far as they are not inconsistent with, or are in aid of, the principal use, viz., for the purposes of navigation. In the absence of the act of 1859, regulating fisheries on Eel river, the right to use the shores between high and low water mark for fishing purposes was common to the people of the state. Aside from that act, there was no statute under which the officers of the state could grant an exclusive right to a fishery of this character; and a title by prescription to the fishing privilege must therefore include the land of plaintiff, as the ownership of the land and the fishing privilege are inseparable. Not only so, but the fifth section of the act declares that any person who shall cast, haul or draw any seine or net, not having the right so to do, shall be deemed and held to be a trespasser against the person whose rights are by the act fixed and determined, but may, in addition to any civil action had thereon, be convicted of a misdemeanor for every such offense, and be punished by fine or imprisonment, or both. We know of no authority which holds that the violation of a penal statute, no matter how long continued, can confer a legal right or title.

The court further found that the defendants claimed and exercised their rights and interests severally and separately, each to a distinct part of the shore. The question of misjoinder of parties defendant was presented by demurrer and answer. The joinder of the several defendants was proper. They severally claimed rights affecting plaintiff's right appurtenant to his land, and their claim, though under different patents, was from the same source, and the injury to the plaintiff, as well as their defense to the action, depended as to each upon the same facts: Pom. Rem. & Rem. Rights, sec. 372; *Fisher v. Hepburn*, 48 N. Y. 41-55.

The finding that defendants are the owners of the south part of the island is not justified by the evidence, and is inconsistent with other and controlling facts found by the court, as is also the finding as to adverse possession. The judgment appealed from should be reversed.

We concur: Vanclief, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is reversed.

PEOPLE v. VITAL.

No. 20,957; November 2, 1893.

34 Pac. 617.

Criminal Trial—Instructions.—Where the Record in a Murder Trial recites that the court read to the jury "instructions asked by the respective parties, and allowed by the court, and those given by the court of its own motion," but does not contain those given by the court of its own motion, or requested by the people, the appellate court will not determine whether or not the trial court erred in refusing to give an instruction asked by defendant, but will set aside a submission of the cause, and restore it to the calendar, to be heard when all the instructions are incorporated into the record.

APPEAL from Superior Court, Santa Cruz County; W. B. Cope, Judge.

Vital was convicted of murder and appeals. Submission of cause set aside and cause restored to the calendar.

A. D. Splivalo and J. A. Spinetti for appellant; Attorney General Hart for the people.

PER CURIAM.—The minutes of the trial of this case and which constitute a part of the record, state that the court read to the jury “instructions asked by the respective parties, and allowed by the court, and those given by the court on its own motion”; but the record filed here does not contain any of the instructions thus referred to, except those given upon request of the defendant. One of the points made by the appellant is that the court erred in omitting to instruct the jury that they had the discretion, in case they found the defendant guilty of murder in the first degree, to relieve him from the extreme penalty of death, and to say, by their verdict, that his punishment should be confinement in the state prison for life. We do not think we should determine this question upon the record now before us; at least until an opportunity is given to the attorney general to supply the instructions given by the superior court upon its own motion and upon request of the people, if such instructions were actually given. It is the duty of a judge to properly indorse all instructions given on his own motion, and when so indorsed they form a part of the record on appeal: *People v. January*, 77 Cal. 179, 19 Pac. 258. The submission of this cause will be set aside and the case restored to the calendar. The attorney general will be allowed thirty days within which to file a complete record, showing all instructions given and refused by the superior court. So ordered.

HOGINS v. BOGGS.

No. 18,155; November 7, 1893.

34 Pac. 653.

Deed—Description—Distances.—Under a Deed Purporting to convey a certain number of feet along a street commencing at a certain point, only that number of feet passed by the deed, and therefore evidence that the grantor, in measuring off the land granted, measured more than that number of feet, is incompetent to show that more than the number of feet stated passed by the deed.¹

APPEAL from Superior Court, Placer County; W. H. Grant, Judge.

Action by Catherine Hogins against J. C. Boggs. Judgment for plaintiff. Defendant appeals. Reversed.

Hale & Craig, John M. Fulweiler and Ben P. Tagor for appellant; Wallace & Wallace for respondent.

TEMPLE, C.—Action to quiet title to land in Newcastle, in the county of Placer. The controversy is in regard to the boundaries. The plaintiff had judgment, and the defendant appeals from the judgment and an order refusing a new trial.

The parties own and occupy contiguous places on Depot street, and both derive title from H. F. Albee. It is agreed that A. N. Page formerly owned a larger tract of land, of which the premises now claimed by both parties constituted a portion. September 9, 1875, Page conveyed to Mrs. H. F. Albee a tract fronting on Depot street one hundred feet and extending one hundred and fifty feet back. The lots of the parties and the strip in dispute extend two hundred feet back from Depot street. The tract conveyed to Mrs. Albee extends along Depot street one hundred feet northerly from the Good Templars' lot. The strip in dispute is six feet wide, and the southerly line of it is just fifty feet nine inches north from the Good Templars' lot. The deed to Mrs. Albee was a bargain and sale deed, and Mrs. Albee testified that she paid \$50

¹ Cited and approved in *Holden v. Alexander*, 82 S. C. 452, 62 S. E. 1112, as holding that parol evidence is not admissible to vary the description of a boundary in a deed.

for the land. There was no evidence tending to show that the money paid was her separate property. The land then was the community property of Albee and wife. November 19, 1877, Page conveyed to H. F. Albee a tract on the north of the lot conveyed to Mrs. Albee, fronting twenty feet on Depot street. This vested in Albee, or in Albee and wife, as community property, a frontage of one hundred and twenty feet on Depot street. Another conveyance was made by Page to Albee and Hogins of a tract including the land theretofore conveyed to the Albees and other lands. This conveyance was intended, as Albee testified, to take in odds and ends. The land described in this deed was conveyed to Albee by Hogins. November 17, 1880, Albee conveyed to Hogins a tract of land described as follows: "Commencing at the northwest corner of the Good Templars' Hall Association lot on Depot street, and running along said Depot street, about northwest, about fifty feet; thence nearly westerly about one hundred and fifty feet, more or less, to Page's line; thence fifty feet in a southerly direction; and thence one hundred and fifty feet, more or less, to the place of beginning." February 23, 1883, Albee conveyed to defendant Boggs a tract of land described as follows: "Commencing on Depot street in said town of Newcastle, at the northeast corner of A. N. Page's lot; thence westerly, along the south line of said Page's lot, a distance of 90 feet; thence south, 20 feet; thence west, 60 feet, more or less; thence south, 50 feet; thence east, a distance of 150 feet, more or less, to said Depot street; thence north along said Depot street, 70 feet, to the place of beginning,—together with the dwelling house thereon, heretofore known as the residence of the party of the first part." In none of the deeds from Page, under which Albee claimed, were any landmarks called for except Abbot's lot, Madden's lot, and Depot street. North of Madden's lot, no landmark was called for except Depot street. The distances are therefore controlling. There was nothing to do, then, but to find the starting point, and measure northerly along the line of Depot street. There was no chance, under such circumstances, for surplus land. It does not appear that any landmarks were set after the deeds were made which were agreed upon by the parties. The land was not immediately inclosed. In 1878 a fence was built in front of the property, and according to that, as I understand the tes-

timony, there was a surplus of seven and three-fourths inches only. Still, a witness, Elmer Albee, was allowed to testify, against the objection of defendant, that he assisted Mr. Page in measuring the one hundred feet conveyed to Mrs. Albee, and that, "as nigh" as he could guess, it was five or six feet over. The only purpose of this testimony was to show that more than one hundred feet passed by the deed to Mrs. Albee. It was clearly incompetent for that purpose. If they measured six feet over the one hundred feet, that did not pass title to anything more than was described in the deed. Mrs. Hogins claims as heir to Daniel Hogins, and under a deed from Albee dated June 23, 1890. Apparently, at that time, Albee had no land to convey, and it is likely the conclusion of the court was based upon the testimony of Elmer Albee as to the surplus six feet. Oral evidence would have been competent to apply the description to the land. For this purpose it might have been shown where H. H. Smith's lot was, that it was the same property afterward known as the "Madden" or "Good Templars'" lot, and where Depot street was. These facts appearing, there were no others which could have thrown light upon the matter. I think the judgment and order should be reversed and a new trial had.

We concur: Vancielief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are reversed and a new trial ordered.

PORTER v. FISHER.

No. 18,108; November 8, 1893.

34 Pac. 700.

Brokers — Parol Contract — Divisibility.—Though, under Civil Code, section 1624, a parol contract employing a broker to sell land is invalid, a broker employed to sell or exchange land, and the personalty thereon, under an agreement for a commission of five per cent on the price may, on bringing about an exchange, recover five per cent on a separate valuation placed on the personalty by the principal,

though in the exchange, as between the parties thereto, there may have been no division of the consideration, as the contract, in such case, is divisible, and that part as to the land is not unlawful, but merely incapable of enforcement.

Brokers — Parol Contract — Divisibility. — It is immaterial whether the separate valuation was placed on the personal property by the principal before or after the exchange, or to whom he made the statement as to the valuation, since it is an admission that the personal property was exchanged at such valuation, so that its price can be separated from the gross sum involved in the exchange.

APPEAL from Superior Court, Fresno County; M. K. Harris, Judge.

Action by G. L. Porter against S. C. Fisher. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Goucher, Jacobs & Jacobs (Oregon Sanders of counsel) for appellant; Nourse & Short for respondent.

HAYNES, C.—Porter, as assignee of one Abbott, brought suit against appellant on several causes of action, among which was one for the sum of \$2,500, as commissions claimed to have been earned by Abbott in effecting a transfer of property between appellant Fisher and one J. A. Baxter. The property Fisher conveyed and transferred to Baxter consisted of two hundred and eighty acres of land in Tulare county, together with stock and personal property of a large amount; and the property conveyed and transferred by Baxter to Fisher was one hundred and seven acres of land at Byron, Contra Costa county, together with all the personal property thereon. Abbott claimed that he was employed by Fisher as a broker to sell or exchange his said property, real and personal, and for which he was to receive a commission of five per cent. His employment, however, as such broker, was not in writing. The cause was tried before the court and a jury, and plaintiff, as assignee of Abbott, recovered on account of the said commissions the sum of \$1,000. The gross recovery by the plaintiff was for a larger sum, but no controversy is made here, except as to the recovery of said \$1,000. The appeal is from the judgment and order denying a new trial. Respondent concedes that no recovery can be had for commis-

sions upon the sale or exchange of the real estate, but contends that the contract for commissions is divisible; that the price of Fisher's real estate was estimated in the exchange at \$30,000 and the price of the personal property at \$20,000; and that he is entitled to recover commissions upon the price of the personal property at the agreed percentage, notwithstanding his contract, so far as the real estate is concerned, was void. The complaint alleges that the commissions were earned by Abbott as agent and broker for the defendant "in the sale, exchange, and transfer of certain real and personal property to one J. A. Baxter, which said real and personal property was sold, exchanged and transferred to said Baxter for the agreed price and consideration of \$50,000, being \$30,000 for real property so exchanged and transferred, and \$20,000 for the personal property so exchanged and transferred; that the defendant agreed to pay to G. Frank Abbott, for his services as his agent and broker in selling and disposing of said property, five per cent commission on the price thereof, to wit, \$2,500." As between Fisher and Baxter, the parties to the trade, there appears to have been no separation of prices between the real and personal property of the defendant alleged in the complaint. It is also evident from the statements of the complaint that the undertaking of Abbott was to sell or exchange the real and personal property of Fisher. Appellant contends that the contract was entire, and is not divisible; that as the agreement to pay commissions upon the real estate was void—not being in writing—there can be no recovery of any part or portion of the commissions.

As between Baxter and Fisher, the parties to the exchange, the testimony does not show such division of the consideration as to clearly make the contract apportionable, as between them. The question, however, arises between one of the parties to the exchange and the broker or agent who made the exchange; and we see no reason why a recovery should not be had for commissions upon the sale of the personal property, if the amount or price thereof can be ascertained with reasonable certainty. The contract set out in the complaint alleges the broker's compensation to be a percentage of the price of the property sold or exchanged; that is, five per cent—five cents on each dollar of such price. If, therefore, the price of the personal property can be separated from the price of the real

estate, the illegality attaching to the contract, so far as the real estate is concerned, does not, we think, necessarily attach to the remainder of the consideration. Section 1624 of the Civil Code merely declares that a contract or agreement authorizing or employing an agent or broker to purchase or sell real estate for a compensation or a commission is "invalid" unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged or by his agent. It is not a contract which is *malum in se*, nor is it *malum prohibitum*. It is merely an invalid contract, or one incapable of enforcement.

In the case of *Jackson v. Shawl*, 29 Cal. 272, a pawnbroker charged upon a loan, secured by a pledge, interest at the rate of seven per cent per month. A statute then in force provided, in effect, that a pawnbroker shall not charge a greater rate of interest on loans exceeding \$20 than four per cent a month in advance. The plaintiff tendered the \$500 loaned, and interest at the rate of four per cent. The court said: "Here the contract between the parties was legal as to the principal sum, but illegal as to the interest. The two things were not inseparable," and, quoting from authorities, further said: "When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the courts will make the distinction, for the common law doth divide according to common reason, and, having made that void that is against law, lets the rest stand. The general and more liberal principle now is that when any matter, void even by statute, be mixed up with good matter, which is entirely independent of it, the good part shall stand, and the rest be void." In *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770, it was held (syllabus): "Where a contract consists of two distinct parts, which are readily severable, and not in any material sense dependent on each other—one part being valid and the other void—the rule is to enforce that part of the contract which is valid"; See, also, *Granger v. Mining Co.*, 59 Cal. 678. In *More v. Bonnet*, 40 Cal. 254, 6 Am. Rep. 621, it was said: "No precise rule can be laid down for the solution of the question whether a contract is entire or separable, but it must be solved by considering both the language and the subject matter of the contract." The cases above cited go further than is required in this case, because the contracts

there considered were, as to some part, at least, unlawful; but it is not unlawful for a broker or agent to act upon a verbal authority or request, in making a purchase or sale of real estate for another. He may lawfully do so, and incurs no penalty for the doing of it. He simply relies upon the willingness of his principal for the payment of his commissions, and cannot compel payment. Section 1599 of the Civil Code provides: "Where a contract has several distinct objects, of which one at least is lawful and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."

Appellant, in his brief, in referring to the testimony of Mr. Abbott, says that he testified that: "Mr. Fisher placed a value upon the real estate and personal property separately. He placed a value on the stallion at \$8,000; on the rest of the personal property, \$12,000; making \$20,000 for the personal property, and \$30,000 for the real property," but insists that it does not appear when Mr. Fisher placed this value upon the real and personal property separately, whether it was before or after the trade, nor whether he made the statement to Abbott, or to some one else, nor that the witness contracted with reference to any such estimate, or with reference to the personal property separately. We think it makes no difference when the defendant placed the separate values on the real and personal property, nor to whom he stated such values. It was an admission upon his part that the personal property was exchanged at the price or value of \$20,000, and that, therefore, the price of the personal property was capable of separation from the gross sum involved in the exchange. Mr. Baxter, a witness for plaintiff, testified: "I gave Mr. Fisher a deed for my one hundred and seven acres of land at Byron. Contra Costa county, together with all the personal property on my place, in return for which Mr. Fisher gave me a deed of his two hundred and eighty acres of land in Tulare county, together with stock and personal property, which personal property he estimated to be worth about \$20,000. The full valuation of land and personal property I took on a basis of \$50,000, which was the valuation set upon it by Mr. Fisher." This testimony corroborates that of Mr. Abbott—that the price of the personal property was capable of being ascertained, and was estimated in the exchange; and while the defendant

claimed upon the trial that the value of both properties was very much less than the price put upon them at the time of the exchange, it was competent for the jury to determine whether such price of the personal property was ascertainable from the evidence, and to fix the price thereof. If the contract had been for a commission upon what Fisher received for his property, a different question would have been presented, and the actual value of the Baxter property would have been involved. But even in that case the separate estimates placed by Fisher upon his real and personal property would have been competent to show the proportion of the entire value of the Baxter property, which was given in exchange for defendant's personal property. The jury must have found the contract to have been as alleged in the complaint, and the estimate of value placed upon his personal property by the defendant could properly be taken as the price referred to in the contract for commissions.

Other questions are made in the record upon exceptions to evidence and to the instructions given to the jury, the more important of which relate to the question above considered, and our conclusion thereon is conclusive of these exceptions. We think the judgment and order appealed from should be affirmed, and so advise.

We concur: Vanclef, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

IRWIN v. McDOWELL.

No. 19,149; November 10, 1893.

34 Pac. 708.

Chattel Mortgages.—In an Action by a Mortgagee for Conversion of the mortgaged chattels, there is no abuse of discretion in allowing defendant, at the trial, to amend his answer, and to aver that the mortgage was released before defendant took the property.

Pledge.—An Instrument Termed a "Bill of Sale," executed by C., authorizing I. to take and sell the articles therein specified till

C.'s debt to I. is satisfied, when the residue shall be returned to C., and reciting that it is given as security for the debt, is a contract for a pledge, within Civil Code, section 2987, providing that every contract by which the possession of personal property is transferred as security only is a pledge.

Pledge—Necessity of Delivery.—Though Such Instrument, by reciting that it is given in lieu of a certain chattel mortgage, shows an intention that it shall take the place of the chattel mortgage, it does not, in the absence of the delivery of the articles thereby agreed to be pledged, release the chattel mortgage, Civil Code, section 2988, providing that no pledge is valid till the property is delivered to the pledgee.

APPEAL from Superior Court, San Diego County; W. L. Pierce, Judge.

Action by I. Isaac Irwin against S. A. McDowell for conversion of chattels mortgaged to plaintiff. Judgment for defendant. Plaintiff appeals. Reversed.

M. S. Babcock for appellant; Hunsaker, Britt & Goodrich for respondent.

SEARLS, C.—The defendant had judgment in the above-entitled cause, from which, and an order denying a motion for a new trial, plaintiff appeals. The case was here on a former appeal from a judgment in favor of plaintiff for a nominal sum, from which he appealed, whereupon the judgment was reversed and a new trial ordered: 91 Cal. 119, 27 Pac. 601. The general history of the case is there stated, and will not be repeated here.

At the last trial, the defendant (respondent here), for the purpose of showing that the property upon which he levied as sheriff had been discharged from the lien of plaintiff's chattel mortgage before such levy, introduced in evidence a bill of sale of certain other personal property from Robert L. Coutts to plaintiff, executed and acknowledged by said plaintiff and said Coutts under date of August 11, 1890. There was no abuse of discretion on the part of the court below in permitting the defendant, at the trial, to amend his answer so as to aver "that the mortgage on the hay and grain levied on in said action of Coutts v. Coutts and hereinafter mentioned was released before the said levy was made."

The "bill of sale," as it is termed, purported to be a conveyance by Robert L. Coutts to plaintiff of certain horses, cows, wagons, harness, etc., on condition that plaintiff was to take immediate possession of the property, and to sell them, or any of them, during thirty days, at a price to be approved by Coutts—the money to be received by plaintiff, and applied upon his demand against Coutts—and, at the end of thirty days, plaintiff was at liberty to sell, at his pleasure, until his demand was satisfied, whereupon the residue of the property was to be returned to Coutts. It then proceeds as follows: "This sale is made, and the property placed in the possession of said Irwin, as additional security for a certain debt secured by crop mortgage, and for goods had and merchandise had and received, by said Coutts from said Irwin." Two or three days after the foregoing bill of sale was executed, Cave J. Coutts, a brother of Robert L. Coutts, with the latter, met plaintiff, and desired him to make some alterations in the bill of sale, to which he at first objected, but finally consented, whereupon they all repaired to the attorney of plaintiff, who, at the request and by the consent of the parties, added to the bill of sale, immediately following the clause quoted above, as follows: "And a certain real estate mortgage executed on November the 23, 1889, is held as additional security to the property held under this bill of sale, which is given, in lieu of the chattel mortgage, as security for the note held thereunder." The parties thereupon acknowledged the execution of the instrument before the attorney, who was a notary public, or, as some of the witnesses thought, it was acknowledged when signed. This, however, is not important, as the instrument related to personal property—not requiring to be acknowledged. The instrument, as first executed, clearly indicated its object to be to give other and further security for the debt due and owing from Robert L. Coutts to plaintiff, in addition to the chattel mortgage. As amended, it just as clearly indicates an intention that it shall take the place of the chattel mortgage. It refers to a certain other mortgage which plaintiff held upon the interest of Coutts in a ranch, as being held as additional security to the property held under this bill of sale, "which is given in lieu of the chattel mortgage." "In lieu" signifies instead of, in place of. We must conclude, from the language used, that it was the intention of the parties that the

instrument, which, upon its face, shows that it was intended simply as security to plaintiff for the debt due him, was intended to take the place of the chattel mortgage. But it by no means follows that the result claimed by appellant ensued, viz., that the chattel mortgage was, upon the signing of the bill of sale, discharged at once. The language used in the instrument indicates that in consideration of the pledge—for that is what it amounts to—of certain horses, cows, wagons, etc., plaintiff was willing to forego and discharge the lien of his chattel mortgage. That was the consideration for what, in effect, was an agreement on his part to forego the claim of his mortgage. But the new security was never delivered to him, and, although he sought diligently for two or three days to obtain possession of the personal property named in the instrument, and which it was the duty of Robert L. Coutts to deliver, he never obtained it; and, at the end of the two or three days, Cave J. Coutts brought an action against the latter, and attached all of the property—the hay and grain covered by the chattel mortgage, because it had been released, and the horses, etc., named in the bill of sale, because they had not been delivered to plaintiff. Was it released? “Every contract by which the possession of personal property is transferred as security only, is to be deemed a pledge”: Civ. Code, sec. 2987. “The lien of the pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge-holder, as hereafter prescribed”: Civ. Code, sec. 2988. A glance at the instrument which we have called a “bill of sale” will show that within the purview of section 2987, *supra*, it was simply a contract for a pledge, and that, until the property pledged was delivered to plaintiff, the contract was executory. The pledge was the consideration for the release of the chattel mortgage, and, until it was perfected by such delivery, it did not operate to release the mortgage, in fact. No duty to execute a release of the chattel mortgage devolved upon plaintiff until he received the consideration for his agreement so to do. Had he, upon demand, refused to give a release, it could not have been enforced, except upon showing that he had received the consideration upon which his agreement was predicated. The mortgage remained of record, and was notice to the sheriff who levied the attachment, and who, a few days later, upon learn-

ing of the existence of the mortgage, released such attachment: *Berson v. Nunan*, 63 Cal. 550. We must not be understood as holding that a mortgage may not be satisfied in fact without a discharge of record, but only that in this case, as the consideration was never received by plaintiff, it was not in fact waived or discharged, and, as it still remained of record, and notice to all the world, even the defendant here, who was sheriff, was not misled by any act of the plaintiff. We are of opinion that the court below erred in holding that the chattel mortgage was released prior to the levy of the attachment, for which error the judgment and order appealed from should be reversed and a new trial ordered.

We concur: Belcher, C.; Vancief, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed and a new trial is ordered.

PEOPLE v. BANNISTER et al.

No. 21,014; November 10, 1893.

34 Pac. 710.

Burglary—Verdict—Degree of Guilt.—Under Penal Code, section 1157, providing that whenever a crime is distinguished into degrees, the jury, if they convict, must find the degree of which defendant is guilty, the jury are not excused from finding the degree though the indictment was for burglary, of which there are but two degrees, and the court instructed that if the jury found defendants guilty they could find them guilty of no higher offense than burglary in the second degree.¹

Criminal Trial—Degree of Crime.—Where the Verdict Fails to find the degree of the crime of which defendant is guilty, he is not entitled to a discharge, but merely to a new trial.

¹ Cited with approval in *McLane v. Territory*, 8 Ariz. 155, 71 Pac. 939, where it was held that a verdict of "guilty as charged in the indictment" under an indictment charging grand larceny, which crime the statute distinguished in degrees, was insufficient.

APPEAL from Superior Court, City and County of San Francisco; W. R. Dangerfield, Judge.

Arthur Bannister and Frank Hawley were convicted of burglary, and appeal. Reversed.

W. I. Brobeck and P. A. Bergerot for appellants; Attorney General Hart for the people.

SEARLS, C.—Defendants were informed against and convicted of burglary. The crime consisted of entering a freight car of the Southern Pacific Company with intent to commit larceny. Defendant Bannister was sentenced to one year's imprisonment in the state prison at San Quentin, and defendant Hawley to three years at the state reform school for juvenile offenders at Whittier. The appeal is from the judgment, and the cause comes up on the judgment-roll, there being no bill of exceptions. By their verdict the jury found the defendants "guilty as charged," and recommended them to the mercy of the court. The crime of burglary is by the Penal Code divided into two degrees. Burglary committed in the night-time is burglary of the first degree. Burglary committed in the daytime is burglary of the second degree. The judgments recite that the court, by its instructions before verdict, advised the jury that if they found the defendants guilty, they could not find them guilty of any higher offense than burglary in the second degree. The jury did not, however, by their verdict, specify the degree of burglary of which they found the defendants guilty. This was error. Section 1157 of the Penal Code provides that "whenever a crime is distinguished into degrees, the jury if they convict the defendant must find the degree of the crime of which he is guilty." The reason for a specification of the degree of the crime becomes apparent when we bear in mind that the severity of the punishment depends upon it. This court has so often declared such a verdict to be erroneous that further comment is unnecessary: *People v. Lee Yune Chong*, 94 Cal. 379, 29 Pac. 776; *People v. Ah Gow*, 53 Cal. 628; *People v. Jefferson*, 52 Cal. 452; *People v. Travers*, 75 Cal. 580, 15 Pac. 293; *People v. O'Neil*, 78 Cal. 388, 20 Pac. 705; *People v. Campbell*, 40 Cal. 129; *People v. Marquis*, 15 Cal. 38.

The defendants were not entitled to be discharged upon the rendition of the faulty verdict, but are entitled to another trial: *People v. Travers*, *supra*; *People v. Lee Yune Chong*, *supra*.

It is stated in respondent's brief that one Thomas Cornwell was informed against in the same information, and that by mistake his name is omitted from the copy of the information in the printed transcript. We do not find in the minutes of the trial any allusion to him, except that he moved to set aside the verdict. There is no judgment in his case, and he is not included in the notice of appeal. We are not called upon to reverse a judgment, of the very existence of which we have no information, upon an appeal which, so far as we know, has never been taken. If Thomas Cornwell was informed against, tried, found guilty, and sentenced to punishment, it may well be he has elected to satisfy the judgment in preference to taking the chances of another trial, and possibly enhanced punishment, even if error intervened, which we do not presume. His case, if any he has, is not involved in this appeal.

The judgments appealed from in cases of Arthur Bannister and Frank Hawley should be reversed and a new trial ordered.

We concur: Vancief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is reversed and a new trial ordered.

PETERSEN v. TAYLOR.

No. 15,116; November 10, 1893.

34 Pac. 724.

Pleading—Failure to Deny Execution of Writing.—In an action for money had and received, the complaint alleged that defendant had on July 2, 1884, executed a written instrument certifying that he held \$655 until certain disputes should be settled between two named claimants of the fund, and that both of the claimants had three years later assigned the certificate to plaintiff. The answer alleged

that the dispute was settled on July 8, 1884, six days after the date of the certificate, and that both the claimants had on that day executed to defendant a written release of all their rights to the money, a copy of which was set out in the answer. Held, that plaintiff's failure to deny the execution of the release by affidavit filed with the clerk of court, as required by Code of Civil Procedure, section 448, admitted the genuineness and due execution of the release, and it must be taken to be what it appears to be on its face.¹

Appeal.—Where Findings are Waived, Every Presumption in support of the judgment must be indulged, except such as are cut off by the specifications of error; and though there is nothing in the testimony, all of which is certified to be in the record on appeal, showing the date of the execution of a written instrument, the judgment cannot be attacked on appeal for the insufficiency of the evidence in this respect, where this particular ground of insufficiency was not called to the attention of the trial court in the specifications.

APPEAL from Superior Court, City and County of San Francisco; J. P. Hoge, Judge.

Action by one Petersen against Jos. W. Taylor to recover money alleged to have been received by defendant for plaintiff's use. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

Nagle & Nagle for appellant; J. C. Bates for respondent.

PATERSON, J.—This is an action to recover the sum of \$780 claimed to be due plaintiff on two causes of action; the first is for \$125 alleged to have been received by the defendant from one Calvert for the use and benefit of plaintiff, and the

¹ Cited in *Carpenter v. Shinnors*, 108 Cal. 362, 41 Pac. 474, where it is denied as applicable in respect to admission of genuineness of tax deeds by failure to deny, to the extent that such deed is what it purports to be upon its face, and that the matters recited therein are true.

Cited and approved in *Newsom v. Woollacott*, 5 Cal. App. 725, 91 Pac. 348, where, in an action for compensation for services, the defendant had pleaded accord and satisfaction, inserting a check given the plaintiff bearing the word "in full for fees," etc. The court said: "In the absence of any evidence to the contrary, respondent is chargeable with what the instrument purports on its face to be, and it must be taken for just what it appears to mean."

Cited in the note in 101 Am. St. Rep. 521, on possession of stolen property as evidence of guilt.

other is for \$655, which it is alleged the defendant holds for plaintiff as assignee of E. & B. Bonnett, under a certificate of which the following is a copy:

"This is to certify that I have the sum of \$655.00 collected from the city and county of San Francisco in the suits of B. Bonnett and C. H. Parker vs. The City and County of San Francisco, claimed by Elie Bonnett, but attached in the suits of Petersen vs. B. Bonnett as the money of B. Bonnett, to abide settlement or suit against me to determine the ownership of said sum.

"July 2, 1884.

"JOS. W. TAYLOR."

Findings were waived, judgment was entered in favor of defendant, and plaintiff has appealed.

As to the first cause of action, it is sufficient to say there is a substantial conflict in the evidence and the judgment of the court thereon must stand.

The plaintiff alleged that after defendant collected from the city and county of San Francisco the \$655 referred to in the last cause of action stated, and assigned and delivered to Elie Bonnett, for the benefit of all concerned, the certificate above mentioned, all disputes about the ownership of the money were settled, and the interests therein of both Elie and B. were sold and transferred to plaintiff; that thereafter, to wit, on December 1, 1887, plaintiff notified defendant of the assignment to him, and demanded payment, which demand was refused. In his answer, defendant denied plaintiff's ownership of the \$655, or any part thereof, but admitted that he signed and delivered the instrument set forth in the complaint. He alleged that all disputes were settled, and the ownership of the property determined, on July 8, 1884, and a written release given, of which the following is a copy:

"We have this day settled all of our affairs, and the judgments in the actions of B. Bonnett vs. The City and County of San Francisco and C. H. Parker vs. The City and County of San Francisco belong to Jos. W. Taylor.

"[Signed] B. BONNETT.

"ELIE BONNETT.

"JOS. W. TAYLOR."

He also pleaded in bar the statute of limitations, and two judgments in his favor in actions brought by plaintiff against him upon the same cause of action. At the trial the instrument called a "certificate" was introduced in evidence, with proof of its assignment to plaintiff November 30, 1887, and that the money had never been paid to Elie Bonnett or plaintiff. B. Bonnett testified that Petersen had a judgment against him for \$655, and attached that amount in his hands, which moneys belonged to Elie, but which Taylor thought belonged to him (B.); that Taylor collected several thousand dollars on the claim of Elie against the city and county of San Francisco, which he had assigned to Taylor for collection; that the \$655 was a part of this money, and Taylor, instead of paying it over, agreed to hold it as custodian till all disputes concerning the ownership thereof should be settled. Upon this showing, appellant claims that he was entitled to recover for money had and received. The contention, however, ignores the effect of the failure to deny the execution of the written instrument set out in the answer. Section 448, Code of Civil Procedure, provides that: "When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant." It is not claimed that any such affidavit was filed in this case. The genuineness and due execution of the instrument were therefore admitted, and it must be taken to be what it appears to be on its face: *Sloan v. Diggins*, 49 Cal. 38.

Plaintiff alleged in his complaint that the money was to be held by the defendant, under the certificate above referred to, "until certain disputes then existing in the ownership thereof should be settled and determined between one Elie Bonnett and B. Bonnett." The answer alleges that such settlement was made on the eighth day of July, 1884, at which time the statement of the settlement was signed by the three parties above named. The certificate is dated July 2, 1884. The settlement was made six days later. Appellant contends that, as the settlement is not dated, it may have been executed the day before this action was commenced, and after

the assignment to him of the certificate; but, as findings were waived, every presumption in support of the judgment must be indulged, except such as are cut off by the specifications. The appellant's specifications, in this case, are insufficient as a basis for an attack upon the ground that the agreement was not entered into on the date alleged in the answer.

At the conclusion of the evidence, it is said, in the statement, that "the foregoing was all of the testimony of the parties," and appellant contends that, as there is nothing in the testimony which shows the date of the execution of the instrument set out in the answer, and above referred to, no presumption can be indulged, so far as the date of the instrument is concerned, and no specification was needed. But we understand the rule to be without exception that, where a decision is attacked on the ground of the insufficiency of the evidence, the particulars in which the evidence is claimed to be insufficient must be stated. The objection cannot be raised for the first time in this court. It is only fair to the court below, and to the party resisting a motion for a new trial, that their attention should be called before the statement is settled to the particulars in which the moving party claims the evidence is insufficient. Judgment and order affirmed.

We concur: Harrison, J.; Garoutte, J.; Fitzgerald, J.

CLARKE v. BAIRD.

No. 15,178; November 10, 1893.

34 Pac. 777.

Appeal—Record.—On Appeal by Plaintiff from an Order vacating an order for the inspection of books of account, and from an order denying a motion to strike out defendant's answer, no error is shown where the record states that final judgment was rendered for plaintiff several months before the order for inspection was made, and before the motion to strike out, and the purpose of the order and motion at such a time is not disclosed.

APPEAL from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Action by Johanna F. Clarke, administratrix, against Andrew Baird. From an order vacating an order for the inspection of books of account, and from an order denying a motion to strike out defendant's answer, plaintiff appeals. Affirmed.

Alfred Clarke for appellant; H. C. Schaertzer for respondent.

VANCLIEF, C.—The transcript contains two notices of appeal—the first from an order vacating “an order for inspection of certain books of account,” made at the instance of plaintiff; and the second “from the order denying plaintiff's motion to strike out the answer of defendant,” on the alleged ground that he had refused to give his deposition in the case. The transcript consists of two bills of exceptions, one to each order appealed from, but contains no part of the pleadings in the action. It is stated in each of the bills of exception that “plaintiff recovered judgment November 28, 1891,” but not even the substance or nature of the judgment is stated. It appears that the order for the inspection of books of account was an ex parte order, made on July 15, 1892, seven and a half months after the judgment in favor of plaintiff, and that the order vacating the above-mentioned order was made on July 29, 1892. Plaintiff's motion to strike out defendant's answer was heard and denied on July 29, 1892. It is difficult to conceive what lawful purpose could have been subserved by striking out defendant's answer, and inspecting his accounts with a third person (Hannah Wittram), or even with the plaintiff, eight months after final judgment; and surely no such purpose is made to appear by the bills of exception. From aught that appears in the record, it would seem that plaintiff should have moved to strike out defendant's answer, and to inspect his books before judgment, if she was entitled to such relief in that action. Had she done so, the action of the court, if properly excepted to, might have been reviewed on appeal from the judgment. As the record discloses no error, the orders appealed from should be affirmed.

We concur: Belcher, C.; Haynes, C.

McFARLAND and FITZGERALD, JJ.—For the reasons given in the foregoing opinion the orders are affirmed.

DE HAVEN, J.—I do not think either of the orders appealed from an appealable order, but, as the practical effect of a dismissal of the appeals is the same as their affirmance, I concur in the judgment affirming the same.

PEOPLE v. NICOLosi.

No. 21,018; November 20, 1893.

34 Pac. 824.

Larceny—Possession of Stolen Property.—A trunk alleged to have been stolen by defendant was found in a shanty which had been occupied by defendant and another for several weeks. The officer searching for it found it, with another trunk, under defendant's bed, covered over with old clothing; and defendant, when asked what it was, replied that it was nothing. When ordered to open it, he said he did not have the key, but when the trunk was examined the lock was found to be broken, and a letter was found in it, addressed to defendant's brother. Being asked whose name it was, and how it came there, defendant said it was his name, and that he put the letter in the trunk himself. Defendant said that the trunk had been left there two weeks before by a man whom he did not know, and who promised to pay him for keeping it. It was shown that the trunk had been stolen about two weeks before it was found in defendant's possession. Held, sufficient to warrant a finding that defendant stole the trunk.

Larceny—Possession of Stolen Goods.—As the evidence clearly proved that the trunk was found either in the sole possession of defendant, or the joint possession of defendant and the person occupying the room with him, the court properly refused to charge that if the trunk was only found in a house which defendant occupied jointly with another, equally capable of having committed the theft, then no definite presumption of guilt could be made, the instruction not being applicable to the facts.

Larceny—Evidence.—It was not Error for the Court to Permit a witness to describe the trunk found with the one that had been stolen, such evidence not being given to show that such trunk had been stolen or lost.

APPEAL from Superior Court, San Bernardino County;
George E. Otis, Judge.

Jaratarno Nicolosi was convicted of larceny and appeals. Affirmed.

E. R. Annable and Paris & Allison for appellant; Frank F. Oster, district attorney, for the people.

VANCLIEF, C.—The defendant and Giovanin Lena were, by information, jointly accused of the crime of grand larceny, committed by feloniously stealing and carrying away a trunk and contents thereof, consisting of ladies' apparel, the property of a Miss Jennie Fetty. On a separate trial the defendant was found guilty and sentenced to imprisonment in the state's prison; and he brings this appeal from the judgment and from an order denying his motion for a new trial.

1. Counsel for appellant contend that the evidence is insufficient to justify the verdict, in that there was no evidence tending to prove the defendant guilty, except proof that the stolen property was found in his possession. But I think there was other evidence sufficiently corroborative of the inference from possession of the stolen property to justify the verdict. The trunk was found in the possession of defendant and Lena, in a small, rough, ten by fourteen, board shanty, in which they had been living only about four weeks, in the town of Riverside, San Bernardino county, by J. W. Dickson, the marshal, and F. P. Wilson, constable, of that town. The shanty had but one window, and that was darkened by boards nailed on the inside, and a gunny-sack on the outside. The marshal, while searching for the trunk in the shanty, and in the presence of defendant and Lena, discovered something under their bed or bunk covered with a quilt, gum-coat and other old clothing, and asked defendant what it was. Defendant answered, "Oh, nothing." The marshal then pulled off the covering, and discovered two trunks, one of which was Miss Fetty's trunk, and ordered defendant to open it. Defendant said: "It ain't my trunk. I cannot open it up. I haven't got any key to the trunk." Upon examination, the marshal discovered that the lock had been broken, and he opened the trunk, and found therein an envelope addressed as follows: "Mr. L. Nicolosi, No. 105 Upper Main St., Los Angeles, Calif." Being asked whose name that was, and how it came there, defendant said: "That is my name. I wrote it and put it there two or three days

ago." Being reminded that he had said he could not open the trunk, and asked to explain, he said nothing. The address on the envelope was that of his brother. Defendant further told the marshal that the trunks were brought there about two weeks before by a man who drove up with a light spring wagon and a gray horse, whom he had never seen before nor since, and who told defendant that he (the stranger) would like to leave those trunks there for a few days, and that he would call for them, and pay for the trouble of keeping them; and thereupon he (defendant) and his partner (Lena) carried the trunks into their cabin. Defendant also said he had not been doing anything since he came to Riverside; that he had come up from Los Angeles to pick oranges. It was proved that Miss Fetty's trunk had been stolen about two weeks before it was found in the possession of defendant and Lena. These circumstances of themselves were sufficient to excite a very strong suspicion of defendant's guilt, even though it had not been known that Miss Fetty or any other person had lost a trunk, and together with the proof that the trunk had been stolen, and found in the possession of the defendant, justified the verdict of the jury: *People v. Chambers*, 18 Cal. 383; *People v. Velarde*, 59 Cal. 457.

2. The defendant asked the court to instruct the jury that if the trunk was "only found lying in a house or room in which he (defendant) lived jointly with another equally capable of having committed the theft, then no definite presumption of guilt could be made." Had the evidence tended to prove only that the trunk was found in a room occupied by defendant and Lena, without showing any connection or relation between them, or how the trunk came there, perhaps it would have been insufficient to prove possession of the trunk by the defendant, individually or jointly with Lena, in which case the instruction asked might have been proper. But the evidence is clear, and without conflict, that the trunk was found either solely in possession of defendant, or in the joint possession of defendant and Lena. This was admitted by the defendant, who testified that he and Lena had voluntarily taken it into their room, and kept it there about two weeks. Therefore, the instruction asked was not applicable to the evidence. It falsely assumed that there was evidence by which the jury might have been justified in finding that the trunk "was only

found lying in a house or room'' occupied jointly by defendant and another, whereas, it was clearly proved that the trunk was not only thus found, but that it had been taken and kept there by the voluntary assistance of the defendant, and was in his possession.

3. While Dickson was testifying for the people, he spoke of and described the other trunk found with Miss Fetty's trunk under defendant's bed. Defendant's attorney objected to "his saying anything in regard to any other trunk than the one described in the complaint, on the ground that it is irrelevant, immaterial and incompetent, and having a tendency to prove the commission of another crime." It is contended that the court erred in overruling this objection. No evidence was given or offered tending to prove the other trunk had been stolen or lost. It was merely described as one of the things discovered in close proximity to the stolen trunk, as were the quilt, gum-coat, and other old clothes with which the trunks were covered. I think the court did not err in permitting a mere description of all things found with the stolen trunk under the defendant's bed. I think the order and judgment should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

SMITH v. CITY OF SAN LUIS OBISPO.

No. 19,296; November 25, 1893.

34 Pac. 830.

Appeal—Review of Decision on Prior Appeal.—Where, on the retrial of an action after a judgment of reversal by the supreme court, the conclusion of the trial court, based on the same facts established on the first trial, is in accordance with the decision on such appeal, such conclusion will not be reviewed on a second appeal.¹

¹ Cited and followed in *Hensley v. Davidson Bros.*, 143 Iowa, 744, 120 N. W. 95, where the court says: "The judgment rendered by the trial court was in exact compliance with the directions given on the former appeal, and that ends the controversy."

APPEAL from Superior Court, San Luis Obispo County;
V. A. Gregg, Judge.

Ejectment by Levi Smith against the city of San Luis Obispo. From a judgment for defendant, plaintiff appeals. Affirmed.

Wilcoxson & Bouldin and J. M. Wilcoxson for appellant;
Wm. Shipsey for respondent.

GAROUTTE, J.—This is an action of ejectment, and for a defense the city avers a dedication of the realty as a public street. The case has once been before the court (Smith *v.* City of San Luis Obispo, 95 Cal. 463, 30 Pac. 591), and a new trial ordered. At the previous trial in the lower court, judgment went for the plaintiff, but it was reversed upon appeal, for the reason that the conclusions of law were not supported by the findings of fact; this court holding that the findings were such as to indicate a dedication of the land as a public street, and that consequently judgment should have gone for defendant. Upon the second trial, the court made the same findings of fact, and in accordance with the previous decision of this court, as a conclusion of law, held that defendant was entitled to judgment. This appeal is prosecuted from the judgment and order denying the motion for a new trial, and the evidence is before us for review.

The conclusion of the court, based upon its findings that the land was dedicated to public use, will not now be reviewed, for the law of the case to that effect was established by the decision of the court upon the previous appeal.

The only remaining contention upon the part of appellant is that the evidence fails to support the findings of fact. We think the specifications of the insufficiency of the evidence wholly lacking in material respects, but, aside from this objection, we deem the evidence entirely sufficient to form a basis for the findings made. Appellant has failed to indicate in his brief any particular finding that is unsupported, and, upon a perusal of the evidence, we also have failed to discover a lack of support therein. The findings are very full, covering the probative facts of the case; there is evidence to support each one of them; and, the law of the case being established to the

effect that such findings warrant the judgment, it is ordered that the judgment and order be affirmed.

We concur: Paterson, J.; Harrison, J.

THRELKEL v. SCOTT.

No. 18,157; November 25, 1893.

34 Pac. 851.

Fraudulent Conveyance—Pleading.—In an Action to Set Aside a conveyance as in fraud of creditors, an allegation in the complaint that the grantor was insolvent when the conveyance was made, and that it was done with intent to defraud creditors, is sufficient, without specifically stating the manner in which the fraud was accomplished, and the conduct and acts in reference to it.

Fraudulent Conveyance—Evidence.—In Such an Action, Statements made by the grantor shortly before executing the conveyance, showing his knowledge of his indebtedness, are admissible on the question of his intention in conveying away his property.

Fraudulent Conveyance by Husband to Wife.—The fact that one conveys a large portion of his property, without valuable consideration, to his wife, knowing at the time that his debts cannot be paid without recourse to such property, tends strongly to prove that the conveyance was made with intent to defraud creditors.¹

Fraudulent Conveyance by Husband to Wife.—The fact that the wife, on receipt of the deed, promised to pay all her husband's debts, does not preclude a finding that the conveyance was fraudulent as against his creditors, since it may have been intended to give her an advantage as to the time of making payment, and thus hinder and delay creditors.

Fraudulent Conveyance by Husband to Wife.—Knowledge of the wife as to her husband's intention to defraud creditors on transferring his property to her is immaterial where she parted with no valuable consideration.²

¹ Cited in *Knox v. Moses*, 104 Cal. 505, 38 Pac. 319, where it is pronounced as not to "limit the effect of the principles declared in *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873, and in no way to militate against anything there decided."

² Cited and followed in *Chalmers v. Sheehy*, 132 Cal. 466, 84 Am. St. Rep. 62, 64 Pac. 712, where in an action to quiet title there was a similar issue, the court saying: "It is immaterial that Mrs. Chalmers was innocent, or that she did know the condition of her husband's affairs."

APPEAL from Superior Court, Placer County; W. H. Grant, Judge.

Action by G. L. Threlkel, administrator, etc., of Robert N. Scott, deceased, against Harriet A. Scott, to set aside a conveyance by deceased to defendant as in fraud of creditors. From a judgment for plaintiff, defendant appeals. Affirmed.

Tuttle & Tuttle for appellant; Hale & Craig and J. M. Fulweiler, for appellee.

TEMPLE, C.—This action was brought under section 1589, Code of Civil Procedure, to recover for the estate property conveyed by the deceased, on the ground that the conveyance was made to defraud creditors. Defendant appeals from the judgment and an order refusing her a new trial. The case has been here before: See *Threlkel v. Scott*, 89 Cal. 351, 26 Pac. 879. Since the first appeal the complaint was amended by adding an averment to the effect that the conveyance was made with the intent to defraud creditors. The complaint now avers facts showing the due appointment of the plaintiff as administrator; his qualification as such; that deceased was indebted in the sum of about \$5,000, for which amount claims have been presented to plaintiff, as administrator, and which have been duly allowed. The assets in the hands of plaintiff, and their value, are stated, showing that they are insufficient to pay the claims allowed. The complaint then proceeds to charge: That October 4, 1888, deceased, being ill and contemplating approaching death, conveyed to the defendant, his wife, certain property, specially described in the complaint, and that defendant has since claimed to be the lawful owner thereof. That the conveyance was without any valuable consideration, and that at the time said Scott was indebted for all the liabilities presented against his estate and was insolvent. “That with intent to defraud his creditors, and to prevent the application of the proceeds of his said property to the payment of his just debts and liabilities, he fraudulently conveyed the same to his said wife, the defendant herein; and plaintiff avers upon information and belief that it will require the whole of said property, and the value thereof remaining after the satisfaction of liens existing thereon at the time

of said conveyance, to meet and discharge the said allowed claims due and payable out of the funds of said estate."

The point is made on demurrer to the amended complaint that it does not sufficiently set out the facts constituting the alleged fraud. It is contended that the manner in which the fraud was accomplished, and all conduct and acts in reference to it, should be specifically stated. I think the facts are stated with sufficient particularity. They are the insolvency of the intestate, and the conveyance with the intent to defraud his creditors. These facts alone are sufficient. The case is not like that where deceit or imposition is charged. Each of these ultimate facts may be proved by a great variety of probative facts, the nature of which are not disclosed by the general statement. In such cases justice requires that further information should be given to enable a defendant to understand the charge made against him. Not so here. In fact, it is difficult to see how the charge can be made more specific.

Objection is made to the ruling admitting certain statements alleged to have been made by Scott at the time the deed was executed, and some six weeks prior to that time. These statements tended to show that Scott knew of his indebtedness, and hence to throw light upon the question of his intention when he executed the deed. The evidence was properly admitted.

It is not necessary to review the action of the court in overruling defendant's motion for nonsuit, for defendant did not rest there, but proceeded to put in further evidence. The question now is, Does the evidence sustain the finding? The fact that one conveys a large portion of his property, without a valuable consideration, to his wife, knowing at the time that his debts cannot be paid without recourse to such property, tends strongly to prove that the conveyance was made with intent to defraud creditors. There is nothing in *Bull v. Bray*, 89 Cal. 294, 13 L. R. A. 576, 26 Pac. 873, opposed to this. On the contrary, this proposition is taken for granted in the opinion in that case. It is there only held that, however clear the evidence may be, the fraudulent intent must be found as a fact, and cannot be deduced as a conclusion of law from the finding that one greatly indebted conveyed a portion or all of his property as a gift. Although such facts, if found, might sufficiently prove fraud, still, under our statute, fraud is itself always a fact to be found by the jury, or the court

when sitting without a jury. The fact of fraud was found here, and the finding is sustained by the evidence.

We do not know whether the court believed the testimony to the effect that Mrs. Scott promised, on receipt of the deed, that she would see all the debts paid; but, even accepting such statement as a fact, it would still leave room for the finding of a fraudulent intent. It might still have been intended to give her an advantage, in that she could take her own time to pay. This would tend to prove a design to hinder and delay creditors.

There was evidence from which the court might justly infer that Scott knew that the insurance policy, if the amount were paid to the estate, would not pay all his debts. There was evidence tending to show that he knew of his indebtedness, and the presumption is that he knew the condition of his affairs. Whether Mrs. Scott knew the condition of her husband's affairs is immaterial, as she gave no valuable consideration for the property; but I think there was evidence tending to show knowledge on her part. The judgment and order should be affirmed.

We concur: Vanciel, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

PEOPLE v. HILL.

No. 21,017; November 28, 1893.

34 Pac. 854.

Embezzlement—Evidence of Another Offense.—On a prosecution for embezzlement, evidence that defendant, two months after the offense charged in the information embezzled another sum of money from defendant, is not admissible to show his intention in taking the first sum.¹

¹ Cited in *State v. Hall*, 45 Mont. 508, 125 Pac. 644, where the principle was held not to apply to a case in which specific evidence is offered to show that the person charged had previously to and at the time of the transaction been indulging in similar dishonest conduct, which evidence must tend to throw light on the offense to which the trial relates.

APPEAL from Superior Court, Los Angeles County; B. N. Smith, Judge.

Claude L. Hill was convicted of embezzlement and appeals. Reversed.

M. E. C. Munday for appellant; Attorney General Hart for the people.

BELCHER, C.—The defendant was convicted of the crime of embezzlement, and the judgment was that he be punished by imprisonment in the state prison at Folsom for the term of three years. From this judgment and an order denying his motion for a new trial, he appeals. The information charges that on the tenth day of August, 1892, the defendant received from one Robert C. Brinkley, as his agent, the sum of \$390, in lawful money of the United States, which he was to pay over to one W. E. De Groot for and on account of Brinkley, but that, in violation of the terms and objects of his agency, he did then and there, on the day named, “unlawfully, willfully, fraudulently, corruptly and feloniously retain, withhold, secrete, embezzle, and convert and appropriate to his own use,” out of the \$390 so received, the amount and sum of \$300, whereby said Brinkley was deprived and defrauded of the said sum by the defendant. The appellant contends that the verdict was not justified by the evidence, and hence that the judgment should be reversed.

It was proved that Brinkley and defendant had been acquainted for twenty-five years. In February, 1892, defendant came to this state, and immediately went to the house of Brinkley, in Los Angeles, and remained there until September following, when he left for San Francisco, where he obtained employment. In May, 1892, Brinkley went east, and was there engaged and traveling about with a theatrical company. During his absence, defendant attended to his financial affairs, paid his bills, etc. Brinkley testified: “During the time I was in the east, Mr. Hill stayed at my house, and transacted my business for me here. He paid my family expenses. I sent the money to my wife, and she turned it over to him.” And Mrs. Brinkley testified: “During my husband’s absence, he sent me about \$100 per month. Sometimes he sent the money

to me and sometimes to Mr. Hill to pay the family expenses. . . . When Mr. Hill was at our house as our guest he was very kind. He took care of the children when they were sick, and looked after the household expenses. He paid the doctor's bills, the grocer, and he paid the electrician who put in the electric plant in our house. I never handled a cent unless he gave it to me. As soon as I got the money I indorsed it and gave it to him." Brinkley was indebted to De Groot on a promissory note which became due August 10th, and was secured by a mortgage on his household furniture. The amount due on the note for principal and interest at its maturity was \$390. On July 20th he wrote defendant from Chicago: "By the way, my note to De Groot will be due on the 10th of August, and I have the money to meet it, and will send it to you as soon as I get back to Memphis. But if he will extend the note for three months longer by your paying the interest for three months \$90, you had better pay Thiele, Clements and others, and I will be in a position to meet the note at the time. I don't know whether he will or not, but you had better try him." Again, on August 1st, he wrote defendant from Memphis: "You had better draw on me for the money to pay De Groot, if he won't wait and extend the note. If he will, you can pay the others. Has June got the money to go home on? I will bet she has not, so I will have to pay for her ticket, I suppose. Let me know, but don't push me too hard, as you know Will gets the bulk of the profits from the opera company and theater." On the 10th of August, Brinkley caused a telegram to be sent by a bank in Memphis to a bank in Los Angeles, directing the payment to defendant of \$390, and the money was promptly paid. Shortly after receiving the money, defendant paid to De Groot \$90 and he (De Groot) agreed to wait for the balance.

In October, Brinkley came to San Francisco and remained there about two weeks. While there, defendant was with him all the time, but nothing was said about the money. He then went to Los Angeles and there saw De Groot, and was told by him that only \$90 had been paid on his note. After two days, he returned to San Francisco, and again met defendant and told him what De Groot said about the payment. Defendant said he had paid the whole debt, and he would go to Los Angeles and prove it. The two then went to Los Angeles

and met De Groot, and defendant and De Groot contradicted each other and had a quarrel about the matter. The next day, defendant told Brinkley that he had paid De Groot all the \$390, excepting \$25, and that if Brinkley would let him have that sum he would go over and pay De Groot and get a receipt for the whole business. Brinkley gave him the \$25, and he went away, but returned shortly and said De Groot would not accept the money. Brinkley owed Niles Pease \$89, and he then handed the defendant \$64 more, and told him to go and pay Pease. Defendant went into Pease's store, and when he came out said to Brinkley: "Come on home, and I will tell you something." They then got on a cable car and went home, and Brinkley says: "In my parlor or library, he told me he hadn't paid the money to De Groot. He said he had used the money for other things. He didn't tell me right then what he did with it. He told me later in the day." On cross-examination, Brinkley testified: "A few days before this trial, and after Hill's examining trial, I received . . . a letter, in Hill's handwriting, containing a list of things . . . which it was claimed he paid out money for. He never would tell me before how he paid out the De Groot money I sent him. I do not know that he paid for my sister in law's ticket when she went east. Mr. Hill was attending to the payment of my family expenses. I didn't know whether he paid out this three hundred dollars for family expenses or not. I don't know what he did with it. . . . The only thing I know about it is that Dr. Thiele was paid, and I didn't know until a few days ago that he was paid. That was \$50 that I owed Dr. Thiele. I thought it was strange that he did not present his bill, and I heard that he had been paid, and I went around to see him, and he said that he had received fifty dollars. I didn't know, as a matter of fact, that Mr. Hill ever took a dollar of my three hundred dollars for his own personal purposes. I couldn't tell what he did with it. I asked him, and he said that he spent it. That is all." The defendant, in his own behalf, testified: "With this \$390 that I received, . . . I went immediately to Mr. De Groot, and paid this \$90, this interest, which I was to pay as soon as the money arrived, and Mr. De Groot said it was all right, and he would allow the principal to go on. I went immediately, and paid Dr. Thiele \$50, and paid this electrician claim of \$17.50, and I

paid his sister's expenses back east, which amounted to a hundred and some odd dollars, and some small bills, drug bills, or something like that; and in that way the money was all expended for Mr. Brinkley's household expenses, and I received not a dollar benefit for myself. . . . His debts here were very numerous. There was the grocer bill, doctor bill, electrician, and, well, most every kind of a bill that could go to make up household expenses, ranging from \$10 up to \$125, . . . the general expenses, which amounted to between a hundred and twenty and a hundred and thirty dollars. He sent a hundred dollars per month expense money, but the general expenses run over that."

The above is a brief statement of the material evidence in this case, and certainly it appears to be by no means strong or conclusive. Looking at all the evidence, it seems to us that the jurors might well have entertained a reasonable doubt as to whether the defendant was guilty or not. There was, however, some evidence, and the verdict cannot, in our opinion, be disturbed on appeal upon the ground that the evidence was insufficient to justify it.

Appellant further contends that several errors of law were committed by the court which also call for a reversal. One of these alleged errors only need be noticed. Brinkley testified, as before stated, that he handed defendant \$25 and then \$64, and told him to go and pay his debt to Niles Pease with it; that they shortly after went to his house, and defendant then told him that he had not paid the money to De Groot, but had used it for other things. Mr. Dupuy, the deputy district attorney, then asked the witness, "When he told you that, what did you say to him, if anything?" The question was objected to by defendant on the ground that it was immaterial, irrelevant and incompetent, and the objection was overruled and an exception reserved. The witness answered: "I asked him to give back the eighty-nine dollars that I had given him to pay Pease, and he would not do it. He says: 'No, you have lost confidence in me, and I won't give you this money, and you go back to San Francisco, and leave me here in the lurch to hustle for myself.' " During this argument of the case, Mr. Dupuy said to the jury: "There was an embezzlement of the \$89 he had given him to pay other debts." Counsel for defendant interrupted the attorney for the people, and

objected to any argument about the \$89. The court said: "The Niles Pease matter, of course, cannot have any bearing upon the present charge, except, perhaps, since it was admitted in evidence as bearing upon the intent; but, even though he had absolutely embezzled that money of Pease, it has nothing to do with this case. But it is in evidence, and is a part of the evidence in this case, and, as bearing on the intent, I think counsel has a right to comment upon it." Counsel for Defendant: "My objection is that it cannot be a proof of intent, and of something that occurred in November, from which it is sought to prove or support the intent of something that occurred in August. He might have stolen a cow in November, and it would not prove intent in August." The Court: "This was brought as a part of the transaction and talk between the defendant and Brinkley. Objection overruled." Mr. Dupuy, continuing, then said: "The two transactions came together then, and while this young man was finding out the flood of this stream, the very flood involved in that stream commingled with it other infernal rascality of this defendant." The evidence objected to was clearly inadmissible. What the parties said about the \$89 was not a part of the *res gestae*, and had no connection with the alleged embezzlement two months before. The prosecution had no right to introduce such evidence for the purpose of showing an intent to embezzle the \$300, and its attorney had no right to comment upon it as a circumstance tending to show defendant's guilt. The rule is that every error is presumed to work injury, unless it appears that no injury could have resulted. That the defendant here might have been, and probably was, prejudiced by the erroneous rulings of the court, is quite apparent. It results, in our opinion, that the judgment and order appealed from should be reversed, and the cause is remanded for a new trial.

We concur: Vanelief, C.; Searls, C.

GAROUTTE and HARRISON, JJ.—For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed and the cause is remanded for a new trial.

PATERSON, J.—I concur. The evidence relating to the defendant's retention of the \$89 does not bring the case within

the decision in *People v. Gray*, 66 Cal. 275, 5 Pac. 240. "It is a dangerous species of evidence" in any case: *Commonwealth v. Shepard*, 1 Allen (Mass.), 581.

PEOPLE v. CROWL.

No. 20,965; December 1, 1893.

34 Pac. 860.

Criminal Law—Presumption.—An Instruction, in a Prosecution for assault with intent to commit rape, that a presumption is a deduction which the law expressly directs to be made from particular facts, and unless this is controverted by other facts the presumption will control, and that among such presumptions is one that an unlawful act was done with an unlawful intent, is proper, the instruction not relating to deductions of fact to be drawn by the jury.

Criminal Law—Intent.—An Instruction That an Intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused does not assume any fact.

Criminal Law.—Instructions Telling the Jury of Their Duty to convict if the evidence satisfies them of defendant's guilt, though not erroneous, are better omitted.

APPEAL from Superior Court, Modoc County; C. L. Claffin, Judge.

J. G. Crowl was convicted of assault with intent to rape and appeals. Affirmed.

Goodwin & Stewart and W. N. Goodwin for appellant; E. E. Copeland, D. W. Jenks and Attorney General Hart for the people.

SEARLS, C.—J. G. Crowl, the appellant, was indicted for the crime of an assault with intent to commit rape upon one Ida Trybschenck, a female child under ten years of age, and upon trial was convicted as charged. The appeal is from the judgment, and the cause comes up on the judgment-roll, without any bill of exceptions. At the trial the court, at the re-

quest of the prosecution, among other instructions to the jury, gave the following: "No. 3. A presumption is a deduction which the law expressly directs to be made from particular facts; and, unless this presumption is controverted by other facts, the jury is bound to find according to such presumption. Among such presumptions are the following: (1) That an unlawful act was done with an unlawful intent. . . . No. 4. An intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity. No. 5. The jurors are the sole judges of all questions of fact, and of the credibility of witnesses. But you are not at liberty to disbelieve the evidence as jurors, if you believe it as men. You are not to throw aside any considerations connected with the testimony, which would be brought to bear in your judgment as men, simply because you are now jurors. While you are to be prudent and cautious, and to give the defendant the benefit of every reasonable doubt, you are not to hesitate in the performance of your duty by reason of any peculiar method of considering testimony or evidence, which you may think belongs to you as jurymen, but which would not belong to you as men. If you are entirely satisfied from the evidence of the guilt of the defendant, your verdict should be 'Guilty,' No. 7. If the evidence entirely satisfies you of the guilt of the defendant, you can have no choice, but must find him guilty. Following the pathway of the evidence, you can turn neither to the right nor to the left, but must accept the conclusions to which the facts lead; and you should remember that it is not the juror, but the law, that inflicts the punishment. No. 9. If the facts entirely satisfy you of the defendant's guilt, you must convict him. In such case no consideration of pity or mercy can influence you. With the consequences which may attend conviction you have nothing to do. They rest upon others." Appellant argues that these instructions do not correctly enunciate the law as applicable to the case.

Instruction No. 3 is taken almost bodily from sections 1959, 1961, and subdivision 2 of section 1963 of the Code of Civil Procedure, and was alike law and applicable to the case in hand. The instruction did not relate to deductions of fact

which are to be drawn by the jury, but to presumptions of law which come within the province of the court. The instruction is not inimical to the doctrine of *People v. Walden*, 51 Cal. 589, *Stone v. Mining Co.*, 52 Cal. 318, and *Scott v. Wood*, 81 Cal. 405, 22 Pac. 871.

The fourth instruction, as to intention, was correct, and did not, as appellant argues, assume any fact. It embodied a legal principle applicable to all persons charged with crime.

The fifth, seventh and ninth instructions related mainly to the duties of jurors in the consideration of criminal cases. Unless there is an apparent necessity therefor, it would seem better in all cases for the prosecution to rely upon the good sense of jurors to do their duty under such circumstances, subject to such explanations as to the scope of their responsibilities as may properly come within its sphere in the argument of the cause. The tendency to ask too many instructions on the part of the prosecution is everywhere apparent. We cannot say the instructions now under consideration are positively erroneous, but, at the same time, think it would have been better to have omitted them.

The tenth instruction, which we have not set out, is an exact copy of the instruction given in *People v. Cronin*, 34 Cal. 195, in relation to the effect to be given to the testimony of a defendant when a witness in his own behalf, and found on pages 195 and 196 of that case. The objection to this instruction has been often made and as often overruled. It matters not what our views would be on the subject were the question here for the first time. Repeated adjudications have placed it beyond the realm of discussion. The judgment appealed from should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

KNIGHT et ux. v. PACIFIC COAST STAGE CO.

No. 19,228; December 2, 1893.

34 Pac. 868.

Carrier—Upsetting of Stage.—In an Action by a Passenger against a stage company for personal injuries received from the upsetting of a stage in coming down a mountain road, it appeared that one of the horses had been inclined to run away; that the road was muddy and slippery; that the horses were going at “a slow jog,” when they were frightened by a landslide; that they ran one hundred yards before the driver regained control; that flying mud and slush made it hard for the driver to see, and tended to frighten the horses; and that the horses were going in a trot, when they were so frightened by another slide that the driver lost control, and they ran away and upset the stage. Held, that there was evidence for the jury as to whether defendant failed to provide suitable horses and driver.

Carrier—Upsetting of Stage.—Where the Only Issues were as to the suitability of the horses and driver, the court properly refused to instruct concerning latent defects in the stage and concerning the duty of the injured party to exercise proper care in endeavoring to recover from the injury.¹

APPEAL from Superior Court, San Luis Obispo County;
V. A. Gregg, Judge.

Action by William G. Knight and wife against the Pacific Coast Stage Company for personal injuries to the wife. From a judgment entered on a verdict for plaintiffs and from an order denying a new trial, defendant appeals. Affirmed.

Graves & Graves for appellant; Wilcoxon & Bouldin and J. M. Wilcoxon for respondents.

HARRISON, J.—The plaintiffs were being carried as passengers in one of the coaches of the defendant on the night of

¹ Cited with approval in *Cutler v. Pittsburg Silver Peak Gold Min. Co.* (Nev.), 116 Pac. 423, where the court says: “Where instructions are framed without reference to the issues on the evidence, and erroneous under the facts of the case, they should not be given; and if given, and they prejudice the rights of the defendant, it is reversible error.”

December 30, 1891, from Santa Margarita to San Luis Obispo; and, while going down the slope of the mountain toward the latter place, and about three miles therefrom, the coach was upset and Mrs. Knight sustained serious injuries, for which this action was brought. The jury rendered a verdict in favor of the plaintiffs for the sum of \$1,000, and from the judgment entered thereon and an order denying a new trial, the defendants have appealed.

It was shown at the trial that it had rained very hard on the previous night, and that on the night in question the road was muddy and slippery; that after reaching the top of the mountain, and while going down, after turning a certain bend in the road, the horses attached to the coach were frightened by a slide of rocks and earth and ran about one hundred yards before they were got under control, and were then driven along until they were frightened by another slide, after which the driver lost all control of them, and, after running about three-quarters of a mile, the coach was upset. It is contended by the appellant that the evidence in the case failed to show any negligence on its part, for the reason that the accident was the result of a casualty which could not have been foreseen or guarded against, and that for this reason the verdict should have been in its favor. There was, however, evidence before the jury tending to show that one of the horses attached to the coach had been inclined to run away; and, although the bill of exceptions does not show the speed at which the horses were driven down the mountain, the driver testified that from the top of the mountain down to the bend where the first slide was encountered he was going at a "slow jog," and that, after their first fright, they ran about one hundred yards, when he got them under control, so that they went in a trot. He also testified that the road was slushy and wet, and that mud was flying, so that he could hardly see anything, and that this would have a tendency to scare the horses. The court instructed the jury very fully upon the propositions of law involved in the case, and left to them to determine whether the injury to the plaintiff was caused through any negligence of the defendant or was the result of an unavoidable accident. Under the circumstances attendant upon the passage down the mountain it was incumbent upon the driver to exercise more than ordinary care, and we cannot say that there was no evidence before the jury in support of the plaintiffs' claim that

the defendant was negligent in providing suitable horses or in the manner in which they were driven.

The court did not err in refusing to instruct the jury that the defendant was not liable for any latent defect in its coach which could not be discovered by the most careful examination or by any known test. There was no issue of this nature in the case. The charge of negligence against the defendant in the complaint is in its failure to provide a suitable driver and suitable horses for said coach, and there had been no evidence introduced respecting the insufficiency of the coach. For a similar reason the court did not err in refusing to instruct the jury respecting the duty of Mrs. Knight to exercise proper care in endeavoring to recover from the accident. No evidence was before the jury tending to show that she had in any particular failed in this respect. The judgment and order are affirmed.

We concur: Garoutte, J.; Paterson, J.

CORCORAN v. HINKEL et al.

No. 15,325; December 13, 1893.

34 Pac. 1031.

Mortgage—Waiver of Redemption.—Defendant in a Mortgage Foreclosure Suit Made a Compromise agreement with plaintiff, whereby the latter agreed to accept a part of the amount claimed if paid within sixteen months, the purpose of the parties being stated to be a sale of the mortgaged premises after a reasonable time to extinguish the debt as fixed by the contract and to save expenses of foreclosure sale. The contract provided that the land be conveyed to trustees and be by them reconveyed in case defendant paid plaintiff within twelve months; that defendant might sell any part by having the price paid to plaintiff; that after twelve and before sixteen months plaintiff might sell the remainder at auction; that a decree should be entered for the full amount claimed, and proceedings stayed until the expiration of the sixteen months, at the end of which time the trustees should convey the unsold land to plaintiff, who might sell it under the decree, in which case the agreement fixing the amount due should be void. Defendant conveyed the land to the trustees, and

then negotiated a sale to H., but defects in the title delayed the closing of the sale until after the sixteen months during which the trustees had power to convey to a purchaser, and it was necessary to convey to plaintiff in order to give H. a good title. Plaintiff, with defendant's consent, conveyed the land to H. at the agreed price. Held, that Civil Code, section 2889, which provides that "all contracts for the forfeiture of property subject to lien, in satisfaction of a lien secured thereby, and all contracts in restraint of the right of redemption from a lien, are void," had no application to such transaction.

Mortgage—Redemption by Administrator.—The Fact That Plaintiff did not formally cancel the indebtedness against such defendant did not entitle the latter's administratrix to redeem the land from the sale to H., when it appeared that such plaintiff never asserted the existence of any such indebtedness after the conveyance of the land to it by the trustees, and that it actually received such conveyance in full satisfaction.

Mortgage—Sale of Land by Brokers.—It Appeared that defendant authorized the trustees to sell the land at a price named, and "to pay commissions" out of the proceeds. They then authorized certain brokers to sell, and the latter negotiated a sale at the price named by defendant. On the title being found defective, defendant directed the trustees to decrease the price agreed on through such brokers by the amount necessary to perfect the title, which they did. Held, that the brokers were the agents, not of the trustees, but of defendant.

Mortgage.—A Finding That the Mortgagee Granted, bargained and sold the land to H. is not inconsistent with the finding of the circumstances attending the sale, which show that the conveyance was made in fulfillment of the arrangement between deceased (the mortgagor) and H., by which the mortgagee became the conduit through which the title passed.

Mortgage—Notice to Purchaser of Property.—In such case H.'s title is unaffected by any knowledge or want of knowledge by him of the contents of the deed from the trustees to his grantor, the mortgagee, or of the trust agreement.

Mortgage—Action to Redeem—Evidence.—In such action to redeem it was competent for H. to show by parol that the conveyance by the trustees to the mortgagee was made, not as a forfeiture, but to consummate a sale made by the mortgagor to a third party.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Mary F. Corcoran, as administratrix with the will annexed of the estate of William Corcoran deceased, against

John Hinkel and others, to redeem certain land which deceased had mortgaged to defendant German Savings and Loan Society, and which was afterward conveyed by it to defendant Hinkel. There was a judgment for defendants, and an appeal by plaintiff from such judgment was dismissed. From an order denying her motion for a new trial, plaintiff appeals. Affirmed.

John A. McKenna for appellant; Robert H. Countryman and T. V. O'Brien for respondents.

PER CURIAM.—Mary F. Corcoran, as administratrix with the will annexed of the estate of William Corcoran, deceased, brought suit against John Hinkel and a large number of other defendants, among whom were the German Savings and Loan Society, William M. Pierson, John R. Jarboe and S. H. Regensberger, the principal object of which was to be permitted to redeem certain premises therein described which Corcoran had mortgaged to said German Savings and Loan Society on July 9, 1877, to secure the sum of \$95,000, then loaned to him by the mortgagee, and which was afterward conveyed by the German Savings and Loan Society (whom for convenience we will hereafter designate as the "bank") to defendant Hinkel. The other defendants not above named were purchasers, respectively, of portions of the property from defendant Hinkel.

The complaint, after alleging the making of the mortgage above mentioned, alleged in substance that in July, 1883, the bank commenced an action to foreclose said mortgage, claiming that there was then due thereunder about \$100,000. Corcoran answered, claiming that by reason of a sale at much less than its value of part of block 144, which he had conveyed to the president of the bank as further security, the amount due was very much less than that demanded; that on March 31, 1886, no decree having been taken in the foreclosure suit, a compromise agreement was made and executed, whereby Corcoran admitted there was then due under said mortgage the sum of \$60,000, and the bank agreed to make a further loan or advancement to Corcoran of the sum of \$5,000, and would accept in full of all its claims against him the sum of \$65,000, with interest from that date at six per cent, together with the

amount of taxes, street assessments, etc., which it might be required to pay, provided the amounts thus agreed upon should be paid within sixteen months from the date of the agreement. This agreement, which is set out in full in the complaint, recites the pendency of said foreclosure suits and the contention as to the amount due, and declares that it is the intention of the parties to adjust, compromise and settle such differences and disputes, and to finally fix and determine the rights, obligations and duties of the parties; and that "it is the desire and intention of all the parties hereto that the land and premises involved and described in said action be sold, after the lapse of a reasonable time, for the purpose of extinguishing all the obligations of the said William Corcoran to said corporation, as the same are determined and fixed by this agreement, and to save, if possible, the expenditure of sheriff's fees upon a foreclosure sale, and to obtain as high a price as possible for the benefit of all concerned herein." The agreement further provided that the mortgaged property, being a large number of parcels situate in Mission block No. 21 of the city of San Francisco should be conveyed by Corcoran to John R. Jarboe and William M. Pierson by a deed of grant, bargain and sale, to be held by them in trust for the uses and purposes specified in the agreement; that at any time within twelve months Corcoran should have the right to have conveyed to him all said property by the trustees upon payment to the bank of the sums above agreed upon, with taxes, etc., and interest, and upon such payment to release all liens and claims against him; that within said twelve months Corcoran might sell any portion of the premises with the consent of the bank, upon payment of the whole of the price received therefor; that after the expiration of twelve months and before the expiration of sixteen months the bank should sell the unsold portions at public auction for cash, or upon terms of credit therein stated, and any surplus that should remain should be paid to Pierson, to whom Corcoran had sold portions of the mortgaged property prior to the agreement. The agreement further provided that to secure the performance of the agreement, and to enforce a sale, in case the property could not be sold under the terms of the agreement, a decree of foreclosure should be entered in the action then pending for the full amount claimed in the complaint, but all proceed-

ings should be stayed until the expiration of the sixteen months from the date of the agreement. Time was made the essence of the agreement, and, in case the compromise sum was not paid within the sixteen months, the trustees should convey all of said property, or the unsold portions of it, to the bank, who might thereafter sell under its decree, and bid it in for the face of the decree and costs and in such case the agreement fixing the indebtedness of Corcoran to the bank at \$65,000 should be void. It was also further provided that purchasers of the property, whether made by auction, sheriff's or other sale, should hold the same free and discharged from any claims of Corcoran, Pierson or Jarboe, by all of whom and the bank the agreement was executed.

In pursuance of the stipulation, a decree was entered in the foreclosure case April 2, 1886, for the amount claimed in the complaint. Pierson who had purchased some of the property subject to the mortgage, conveyed to Regensberger, and Regensberger joined with Corcoran in the conveyance to the trustees, and this deed was recorded August 20, 1887, and the said agreement was recorded February 7, 1888. On August 18, 1887, the trustees conveyed to the bank in pursuance of the agreement. The amount then due under the decree was \$113,779.07. Said deed contained the following clause: "And the said William Corcoran and the said S. H. Regensberger have joined in this instrument in token of their acknowledgment that the matters herein recited are true"; and they signed said deed. This deed, it is alleged, was recorded August 19, 1887, and on the next day the bank conveyed to defendant Hinkel all of said property for the consideration of \$80,000, and Hinkel gave the bank a mortgage on the same property for \$50,000, part of the purchase price. The complaint further alleges that Hinkel took this conveyance with full knowledge of said agreement and of the Corcoran mortgage and of the foreclosure proceedings, and that the properties so conveyed to him "were for a long time prior to the commencement of this suit, and now are, worth the sum of \$20,000 or thereabouts." The complaint was not verified.

All the defendants answered. The answer of the bank and Mr. Jarboe was: (1) A general denial. (2) A judgment of dismissal of a former suit brought by the plaintiff upon the same cause of action, numbered 22,804, in superior court.

(3) A judgment of nonsuit in another action, numbered 27,690, in superior court. (4) Alleged the original mortgage, foreclosure proceedings, disputes as to amount of Corcoran liability, the making of the agreement, and the conveyance to the trustees; the efforts of Corcoran to sell; that it was placed in the hands of Bovee, Toy & Co., as his agents; that they negotiated a sale to Hinkel for said sum of \$80,000; that there were defects in the title which caused delays in the transaction, which carried it beyond said period of sixteen months; that the power of the trustees to convey to a purchaser under the terms of the agreement had ceased, and for that reason it became necessary to convey to the bank under the terms of the trust in order to give the purchaser a good title; that such conveyance was made for the purpose of consummating the sale thus negotiated to Hinkel, and was made with the knowledge, concurrence, and consent of Corcoran, and at his instance and request; and by the conveyance to the bank and from the bank to Hinkel the sale made by the agents, Bovee, Toy & Co., was consummated, and that Corcoran never afterward asserted or claimed that he had any interest in the property. The court found in favor of defendants, and rendered judgment against the plaintiff. An appeal was taken from the judgment, which was dismissed, and this appeal is from an order denying plaintiff's motion for a new trial.

Appellant contends that the agreement of March 31, 1886, and the trust deed to Jarboe and Pierson were intended to and did operate as a security to the bank, for the sum fixed thereby to be due to the bank under the mortgage, and the further sum of \$5,000 then loaned by the bank to Corcoran; that the clause therein providing for a forfeiture in case the same should not be paid within sixteen months was void, and that the conveyance by the trustees to the bank did not convey an absolute title, nor cut off Corcoran's right to redeem. In support of this contention counsel for appellant cites section 2889 of the Civil Code, which is as follows: "All contracts for the forfeiture of property subject to a lien, in satisfaction of a lien secured thereby, and all contracts in restraint of the right of redemption from a lien are void"; and many authorities are also cited by counsel in support of that proposition. The court found all the facts stated in the fourth defense of the answer of the bank and Jarboe and Pierson to be true (except

as to the cancellation upon the books of Corcoran's debt); and these facts take the case out of the spirit and purpose of the above code provision. The code commissioners, in a note to this section say: "Of course a mortgagor may sell his property to a mortgagee, but the transaction must be a genuine sale and not a forfeiture." If we examine this contract, it will be found that its evident purpose was to afford Corcoran an opportunity to dispose of the property and pay the compromise sum within the time limited thereby. The title was vested in the trustees as clearly for that purpose as for the other purpose of conveying to the bank in case no sale should be made within the time limited; and the sale of the property was in fact made by Corcoran to the defendant Hinkel, though it was consummated by a conveyance through the bank, because of delays in perfecting the title after the terms of sale were agreed upon, which carried the transaction beyond the time limited in the agreement within which the trustees were authorized to convey to a purchaser, and which made it necessary that the title should pass through the bank. The testimony of the witnesses in this regard is conclusively corroborated by the conduct of the bank, for, under the terms of the agreement and of the trust deed, as well as of the deed from the trustees to the bank, it was no longer obliged to accept the compromise sum of \$65,000, but had a right to the sum found in the decree of foreclosure amounting to \$113,000, and to buy the property at that sum; but, instead of doing so, the bank carried out the sale as agreed upon between Corcoran and Hinkel, and conveyed the property to him the next day after the trustees conveyed to it, receiving \$30,000 cash and taking a mortgage from Hinkel for \$50,000.

It is said, however, that the bank did not cancel Corcoran's indebtedness. The court found "that no formal cancellation was proved," but that it was proved that the bank had never claimed or asserted that any indebtedness existed from Corcoran after the conveyance made to it by the trustees, and that the bank actually did receive said conveyance in full satisfaction. But it is further contended by appellant that the alleged sale by Corcoran to Hinkel was not made by Corcoran; that the trustees employed Bovee, Toy & Co., real estate brokers, to sell the property, and that they had no authority to do so. The court, however, found that Bovee, Toy & Co.

were employed by Corcoran, as alleged in the fourth defense. This finding is based upon a written authority given by Corcoran to Jarboe and Pierson to sell the property for \$85,000. and to pay commissions out of the proceeds. In their efforts to sell, therefore, they were not acting under any power contained in the trust deed, but under a direct authority from Corcoran. Jarboe and Pierson, after they received this authority from Corcoran, authorized Bovee, Toy & Co. to sell. They negotiated a sale to Hinkel at the price of \$85,000, conditioned upon the title being found satisfactory. Upon investigation it was found that it would require \$5,000 to clear the title by buying Pattee's claim, and upon this being reported to Corcoran, on July 9, 1887, he wrote Jarboe and Pierson: "You are authorized to so modify the contract of March 23, 1887, made by you through Bovee, Toy & Co. with John Hinkel for the sale of the property therein described, as to make the purchase price \$80,000, instead of \$85,000, it being understood, however, that the purchaser is to take the title subject to the Pattee title and suits and the Donahue title." The authority given Jarboe and Pierson contemplated the employment of subagents, while the above writing ratified such employment, and made Bovee, Toy & Co. his agents. The finding that the conveyance was made to the bank with the agreement that the bank should convey to Hinkel in compliance with the agreement made through Bovee, Toy & Co., and with the consent and concurrence of Corcoran, is sustained by the evidence; and, in view of the foregoing, the further contention of appellant that \$80,000 was not an adequate consideration for the property is without merit.

It is further insisted by appellant that certain of the findings are conflicting. The conflict alleged is between finding No. 45 and findings numbered 20 to 25, inclusive. In finding 20 it is said the bank granted, bargained and sold the property to Hinkel. This is not inconsistent with the finding of the circumstances attending it which show the conveyance to have been made in fulfillment of the arrangement between Corcoran and Hinkel which made the bank the conduit through which the title passed. Finding No. 21 is to the effect that Hinkel had only constructive knowledge of the contents of the deed from the trustees to the bank. But it is immaterial, so far as the validity of his title is concerned,

whether he had actual or constructive knowledge. Finding 22 relates to Hinkel's knowledge of the trust agreement, and to which the above is a sufficient reply. His title is unaffected by any knowledge or want of knowledge of that agreement. Finding 23 is that Hinkel purchased in good faith. We find nothing in the findings which conflicts with that statement. As to findings 24 and 25, it is immaterial whether Hinkel relied as to title upon the fact that the bank had taken a mortgage upon the property, or whether he had only constructive knowledge of the decree of foreclosure, nor can we perceive any conflict in the findings which in any manner affects the judgment.

Appellant further insists upon a reversal because the court failed to pass upon certain objections to evidence during the trial. Defendants had put in evidence the written authority given by Corcoran to Jarboe and Pierson, dated July 29, 1887, to accept \$80,000 from Hinkel because of some defect in the title; and Mr. Pierson, being examined as a witness on the part of defendants, was asked, "When was that sale consummated?" The witness replied: "It was consummated through the German Bank. I don't know the date of the transaction." Counsel for plaintiff said, "We object to that, unless there is some authority here." The court said, "Well, he has not offered it yet." The witness, continuing, testified that after the negotiations had culminated in an agreement as to price, the question of passing the title came up. An objection was made that the power of the trustees had expired by limitation, and that the proper course would be for the trustees to convey to the bank and have the bank complete the transaction. Plaintiff's counsel contended that, unless this was followed up by written authority, the testimony was irrelevant and incompetent. After discussion the court said, "I see no objection to the proof at all." The record then states that the witness was allowed to go on with the understanding that defendants supplement the parol proof with written evidence that Corcoran authorized it, and that plaintiff had the right to renew these objections at any time during the trial. Other parts of the record show that it was not claimed that Corcoran in writing assented to this mode of transfer, unless such assent could be inferred from the fact that he joined in the deed to the bank in token that the recitals therein contained were true, while

nothing is found intimating that defendants intended to supplement this evidence by written evidence; nor does the record show that the objections were renewed. In appellant's brief it is said that the point was argued in the court below in the briefs filed, but that is not in the record. The objection raised by counsel was clearly ruled upon by the court, when it said, "I see no objection to the proof at all"; and no exception was taken. Besides, the evidence was clearly competent, and the plaintiff would not have been benefited by an exception. Without citing authorities, it may be briefly said that in this state it is well settled that a deed absolute upon its face may be shown by parol evidence to be a mortgage, and, that being true, no reason can be conjectured why such evidence may not be rebutted by parol. It was clearly competent to show by parol that the conveyance was made to the bank, not as a forfeiture to it, but to consummate a sale made by Coreoran to a third party. We find no ground for a reversal. The order appealed from is affirmed.

DREW v. ROGERS.

No. 18,245; December 19, 1893.

34 Pac. 1081.

Chief of Police—Election.—Where One, Without the Qualification of being a citizen of the United States, has been elected to the office of chief of police of a city, the election will be annulled and his certificate canceled.¹

¹ Cited in *People v. Bass*, 15 Cal. App. 68, 113 Pac. 697, where the court, speaking also of *People v. Rogers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668, says: "*People v. Rogers* was a different case, and the parties plaintiff were different from the case of *Drew v. Rogers*."

Cited in *People v. Wilson*, 6 Cal. App. 129, 91 Pac. 663, in respect of the judgment therein having been admitted in evidence in *People v. Rogers*, 118 Cal. 394, 46 Pac. 740, 50 Pac. 668, which was a case distinct from the other.

Cited in *People v. Rogers*, 118 Cal. 395, 397, 398, 400, 50 Pac. 668, 669, as part of history of the case, the one case growing out of the other.

APPEAL from Superior Court, Sacramento County; W. C. Van Fleet, Judge.

Proceeding by Moses M. Drew against John B. Rogers to contest defendant's right to the office of chief of police. Judgment for plaintiff. Defendant appeals. Affirmed.

Robert T. & Wm. H. Devlin and Brusie & Layson for appellant; Johnson, Johnson & Johnson and C. T. Jones for respondent.

PER CURIAM.—On March 8, 1892, there was a general municipal election in the city of Sacramento, at which the defendant, Rogers, received the highest number of votes for the office of chief of police of that city. He received a certificate of election and entered upon the duties of the office. This proceeding was brought in the superior court, under section 1111 et seq. of the Code of Civil Procedure, to contest the right of said Rogers to hold said office, upon the ground that he was not eligible thereto at the time of said election. The court found that he was not eligible, and entered judgment annulling the election and canceling the said certificate. From this judgment Rogers appeals.

The appellant was born in Australia, of British parents, and came with them to this country when a child; and the question before the court was whether or not he had become a citizen of the United States ninety days before the election. He contends that he had at that time become a citizen—first, because his father, Thomas H. Baxter, was naturalized before appellant was twenty-one years old; and, second, because, while he was a minor, his mother, Mary Baxter, married one W. A. Rogers, who was a native-born citizen. As to the first of these contentions, the court found that appellant's father was not naturalized until after appellant had attained his majority; and the evidence upon that point was such, to say the least of it, as to leave no room for disturbing the finding. As to the second contention, the court finds that at the time of the alleged marriage of Mary Baxter to W. A. Rogers the husband of the former, Thomas H. Baxter, was living, and continued to live until after the death of said Mary; and that, while they had separated, they were never divorced; and this finding is clearly warranted by the evidence. Appellant con-

tends that the law to sustain the second marriage will presume a divorce, but it is not necessary to inquire into the correctness or extent of such presumption, for the court finds that, independent of the absence of proof of divorce, there never was any marriage between appellant's mother and said W. A. Rogers; and we cannot say that the evidence does not warrant such finding. There are no other points in the case which we deem necessary to be noticed. As remarked by the learned judge of the court below, it is perhaps unfortunate that the judgment is not in harmony with the choice of a majority of the voters as expressed at the time of said election, but the will of the people can be exercised only by the methods and within the limitations prescribed in their constitution and laws. The judgment appealed from is affirmed.

HAMILTON v. BATES et al.

No. 19,211; December 21, 1893.

35 Pac. 304.

Corporations.—Where a President of a Corporation Agrees that the corporation shall assume the debts of a person, it cannot be held liable by a creditor of such person, no corporation action with relation to the contract being shown, but it being claimed simply that money paid on the contract came into possession of the corporation.¹

¹ Cited with approval in *Standard Underground Cable Co. v. Southern Independent Telephone Co.* (Tex. Civ. App.), 134 S. W. 433. The plaintiff in that case had shipped to El Paso a cable ordered by the Southern Electric & Machinery Company, whom one Mrs. Brett, who had contracted to construct the defendant's plant, etc., had made subcontractor for the work. Delivery to the latter company was suspended and plaintiff's local agent, Wiley, held it awaiting payment. Mrs. Brett had been president of a corporation, to which the defendant virtually had succeeded, although it had not gone out of existence formally, and Wiley prepared a letter, which he persuaded Mrs. Brett to sign, guaranteeing payment for the cable. Mrs. Brett signed as president and one Miller as secretary of the defendant company. The court said: "No action was taken by the directors or stockholders of the corporation in regard to the cable either before or after the letter was signed by Mrs. Brett, and there is no claim of the ratification of her acts by the corporation. No advantage was gained or profit reaped by the telephone company by reason of the execution of the contract." The judgment below adverse to the plaintiff was affirmed.

APPEAL from Superior Court, Los Angeles County; W. L. Pierce, Judge.

Action by Charles S. Hamilton against F. E. Bates and others and the Coronado Beach Company. Judgment for defendants. Plaintiff appeals. Affirmed.

J. J. Henderson and Luce & McDonald for appellant; Works & Works for respondents.

TEMPLE, C.—This appeal is from a judgment of nonsuit, rendered in favor of the defendant, the Coronado Beach Company, and was taken within sixty days after the rendition of the judgment. The action was brought to recover \$2,152 for goods sold and delivered to Ben S. and Josie A. Miller. The respondent was sued upon the supposition that for a valuable consideration, paid to it by one F. E. Bates, it had promised to pay all the indebtedness of the Millers. Plaintiff claims that the contract is one made expressly for his benefit, upon which he may therefore sue, as provided in section 1559, Civil Code. Ben S. Miller and Josie A. Miller, his wife, had purchased a large amount of land from the Coronado Beach Company, for which they held contracts, the purchase money not having been paid. They had built upon the land purchased a hotel called the "Hotel Josephine." About January 27, 1888, being unable to pay their indebtedness, they entered into a verbal arrangement with Bates, who had become liable for a large amount of their indebtedness, by which Bates was to take their property and sell it, and from the proceeds pay their debts. It is a matter of dispute as to whether Bates then undertook and promised to pay all the indebtedness of the Millers. The purchase money due the respondent, for which they held the land as security, was \$40,785.41. Bates had previously become responsible for about \$1,900 of the Millers' debts, and they owed about \$8,000 more, which are called "floating debts." The debts sued upon are a part of this floating indebtedness, for which Bates was certainly not liable prior to the arrangement with the Millers, above alluded to; and I think there is no evidence in the case upon which the court could have found that Bates then assumed such debts. Subsequently to the verbal arrangement it was

agreed that respondent should convey the title to the land to Bates, who should secure the purchase money by a mortgage to the respondent. Accordingly the deed and mortgage were executed, and at the same time an instrument in writing by all the parties, reciting the change in the relation of the corporation to the property, and wherein Bates agreed to save the respondent harmless from loss through certain claims against the property, and particularly against the attachment of the Chadbourne Furniture Company and the floating indebtedness of the Millers. Afterward, March 10, 1888, the Millers executed a release in favor of Bates, whereby they released Bates from all claims on account of the conveyance to him of said property, provided Bates should pay all their indebtedness in the county of San Diego, not exceeding in the aggregate \$70,000. This was not signed by Bates, and was probably intended to release him from that part of the first verbal arrangement in which it was agreed that, in case of a surplus after payment of the debts, such surplus should be equally divided between Bates and the Millers. Before this last instrument was executed, however, to wit, February 23, 1888, Bates had become convinced that he would be unable to manage the debts of the Millers, or prevent the property from being sold under the attachments. He therefore informed Babcock, who was president and manager of the respondent, of his inability. Babcock then asked what he could do to induce the corporation to assume the indebtedness of the Millers. It was then finally arranged between Bates and Babcock, acting as president and manager of respondent, that Bates would pay to respondent \$15,000, and hold the property for the Beach Company, or convey it to anyone at request of that company; that, in case the debts were paid, the corporation should have and retain one-half of any surplus that might remain, and Bates should have the other half; in consideration of which Babcock agreed for the corporation that it would pay all the indebtedness of the Millers. Bates paid to Story, who was acting with Babcock, for the corporation, of which he was vice-president, the \$15,000. This was charged to the corporation, and most of it, it is shown, was afterward paid out in the name of the corporation upon the debts of the Millers in discharge of attachments upon the property.

Respondent's counsel contend that the evidence only shows that Babcock and Story undertook and agreed to pay certain debts which were then threatening to throw the Millers into insolvency, and did not assume to pay all the debts; but, as the judgment is by nonsuit, we must assume as against it that every fact was proven in favor of plaintiff which there was any substantial evidence tending to prove. It will be presumed that the trial court considered all such facts as established, and held as matter of law that, conceding that they were proven, they did not entitle the plaintiff to judgment. Bates testified very clearly that Babcock agreed for respondent that it should assume all the debts of the Millers in San Diego county. The motion for a nonsuit was based upon seven alleged defects in the evidence. The one sustained by the court was that it was not shown that the corporation ever assumed the indebtedness. As I think this point must be sustained, it is not necessary to consider the others. The only showing in regard to the corporation in the record consists in the allegation that it is a corporation; the proof that it had sold land to the Millers; that it conveyed the title to Bates, and received a mortgage for the purchase money; that Babcock assumed to act for it as president and manager; that Story signed a receipt as its vice-president; that a payment was made in its name, and a note so indorsed; that Story was heard to say that he had paid the \$15,000 to it, and the testimony of Bates that some of the Miller land had been sold, and the proceeds divided between himself and the corporation. There was no proof as to the character or purpose of the corporation, or the nature of the business in which it was engaged. There was no proof as to who were its directors or stockholders, or that Babcock or Story owned any stock except by such presumption as would arise from the fact that they assumed to act as president and vice-president. No corporate action of any kind is shown. There was, so far as the proof shows, no meeting of the board of directors or of the stockholders. There was no proof tending to show the nature or extent of the authority of the president or vice-president, or that they had been accustomed to transact business of any kind for the corporation. It is not a case where an agent had ostensible authority, as there is no evidence whatever as to what Babcock's authority was, and no facts tending to show that anyone had a right to

assume anything whatever as to the extent and scope of his authority. There is no proof that anyone was or could have been deceived upon the subject. It is not shown that the directors took any action whatever upon the matter. Perhaps, had they done so, it might be assumed that a resolution authorizing it had been passed. It is not shown in proof that there were any directors. It was not shown that the articles of incorporation—in other words, its charter—would justify such a transaction. One dealing with a corporation is bound to take notice of the limitations of its charter: Morawetz on Private Corporations, sec. 591.

It is not claimed that there is any proof of an actual ratification of the agreement made by Babcock and Story, but it is contended that the corporation has received the benefit of the contract, and cannot now repudiate its obligations. The benefits alleged to have been received are the \$15,000 paid by Bates in cash; the agreement that the land should be sold, and the corporation should have one-half of the surplus; and the statement of Bates that some land had been sold, and the proceeds divided between himself and the Beach Company. So far as the first is concerned, it seems to have been a mere matter of bookkeeping by Babcock and Story. They charged the money to the corporation, and when it was paid out in discharge of the Miller debts the checks were drawn in the name of the corporation. It is not shown that any stockholder or director ever knew of the transaction, or that the treasurer of the corporation—if there be one—ever had the money. It is presumable that more than that sum was paid to discharge pressing Miller debts, for Bates testified that he made the arrangement with Babcock because he only had \$15,000, which was not enough for that purpose. The evidence only shows that Babcock and Story paid the Chadbourne claim, which was a little more than \$13,000. It was shown that the property was not sold for enough to pay the Miller debts. It was in fact sold to pay the purchase money. As to the statement of Bates that he had sold some land and divided the proceeds, it does not appear when he sold the land. It may have been before the arrangement with Babcock, and the money part of the \$15,000. But Bates does not specify how the money was paid or to what agent of respondent he gave it. We are justified in supposing it was simply given to Babcock or Story.

But there is nothing in all this which tends to prove a ratification of the contract made by Babcock and Story. At the most, it would only tend to show that the corporation had received a benefit which it could not retain when it repudiated the contract made on its behalf. In *Foulke v. Railroad Co.*, 51 Cal. 365, it was held that in such case the express contract is not ratified, but the corporation is liable upon an implied contract to pay for the benefit received, and the recovery must be limited to the extent of the benefit. Section 1559, Civil Code, only authorizes a person not a party to a contract to sue when it is expressly made for his benefit. He cannot sue upon an implied contract, and, if he could, in no sense would this be one made for his benefit. And then there is a total absence of proof showing that the respondent has retained any benefit from the arrangement. As the property did not sell for more than its own debt, for which it had a preferred lien, the presumption is it has nothing.

It is not necessary here to hold that a corporation may not so deal with an unauthorized contract as to be held to have become bound by its terms. We are dealing with a case in which no corporate action with reference to the contract is shown, but where it is claimed simply that money paid upon the contract has come into its possession. There is no evidence tending to show that any creditor has been induced to change his position to his injury by reason of supposed assumption of the Miller debts. Indeed, they would hardly have been justified in doing so, in view of the fact that in the code the right of the parties to the contract to rescind it at any time, at least before it has been acted upon, is expressly recognized. I think the judgment should be affirmed.

We concur: Searls, C.; Vanelief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

In re KOWALSKY.

No. 15,329; December 22, 1893.

35 Pac. 77.

Attorneys—Misconduct—Disbarment.—The Judge of Department 9 of the superior court of San Francisco, who had directed a guardian not to pay out any of the trust fund except on order of the court, refused to grant an attorney an order allowing payment for services, because not properly itemized. This judge had, in fact, never had jurisdiction of the matter, and the attorney was so told by the judge of department 10, where the same was pending, and who promised to sign the order. The attorney thereupon, in good faith, obtained the money from the guardian, after telling him the facts. Held, no ground for disbarment.

Proceedings to disbar Henry I. Kowalsky. Dismissed.

Robert Y. Hayne for petitioner; Frank M. Stone for respondent.

PER CURIAM.—This proceeding was instituted here by a written accusation charging Henry I. Kowalsky, an attorney of this court, with certain professional misconduct, and praying that he “be removed from the office of attorney and counselor at law.” Kowalsky filed a written answer to the accusation, and the proceeding was referred to Hon. Niles Searls, now one of the commissioners of this court, to take evidence in the matter, “and to report the facts adduced therefrom to this court.” The commissioner took, in writing, the evidence introduced by the parties to the proceeding, and returned the same to the court. He also reported, made and filed his findings of facts, which are as follows:

“Filed June 3, 1893.

“In the Supreme Court of the State of California.

“Proceedings to remove Henry I. Kowalsky from the office of attorney and counselor at law. (No. 15,329.)

“The undersigned, heretofore appointed a committee to take depositions in the above-entitled proceeding, and to report the facts deduced therefrom to the supreme court, begs leave to

report that the parties appeared before him by their respective attorneys—John A. Wright, Esq., appearing for and on behalf of the prosecution, and Frank M. Stone, Esq., on behalf of Henry I. Kowalsky, the accused; whereupon the testimony offered by the respective parties was received, reduced to writing, and is herewith reported to the court. From the testimony so taken, and from the admissions in the pleadings, and after argument of counsel for the respective parties, I find the following facts:

“(1) Henry I. Kowalsky is, and all the times mentioned in the proceedings herein was, an attorney and counselor at law, regularly admitted to practice as such attorney and counselor, in all the courts of the state of California.

“(2) On the 27th day of March, 1890, one P. J. Corbett, by an order of the superior court in and for the city and county of San Francisco, state of California, made in department No. 10 thereof, by Hon. Walter H. Levy, one of the judges of said court, and judge of said department No. 10, was duly appointed guardian of the person and estate of a certain minor named Henry MacDonald, and duly qualified as such guardian, giving a bond in the sum of one hundred dollars, being the amount fixed by the court, whereupon letters of guardianship issued to him, and he entered upon the discharge of his duties as such guardian, and continued so to act during the time hereinafter mentioned.

“(3) The minor, Henry MacDonald, at the time of the appointment of the said guardian, asserted himself, or was asserted by his mother, to be the son of one C. E. S. MacDonald, deceased, who was a man of large wealth, and whose estate was then in the course of administration in the said superior court, but the said claim of relationship was denied by the relatives of the said decedent; and the said minor, Henry MacDonald, was possessed of no property, and had no expectation of receiving any during his minority, unless he established, by process of law, his said disputed claim of relationship, and obtained a part of said estate.

“(4) Jeremiah D. Sullivan, Esq., an attorney at law, entered into an agreement with the mother and family of the said minor, Henry MacDonald, by the terms of which, in consideration of one-half of any sum or sums of money which might be recovered for said minor from the estate of C. E. S.

MacDonald, deceased, he undertook to conduct, as an attorney, such proceedings as might be necessary to establish the right of said minor to said estate, or to an interest therein. Said Sullivan appeared as the attorney for P. J. Corbett in the matter of procuring for him letters of guardianship of said minor, and the said Corbett, as guardian, assented to the agreement between Sullivan and the family of said minor in reference to the services and compensation of said Sullivan. Some months later, said Jeremiah D. Sullivan, finding that the course of litigation necessary to establish the rights of said minor in and to the estate was likely to be protracted and laborious, employed the respondent, Henry I. Kowalsky, as associate counsel, to assist him therein, and the latter labored for a period of from four to seven months, assiduously, in the accomplishment of the object of his employment.

“(5) The proceedings to establish the claim of Henry MacDonald to be the son of C. E. S. MacDonald, deceased, and to be entitled to a share in his estate, were initialed and prosecuted in the superior court in and for the city and county of San Francisco, and in department No. 9 thereof, of which Hon. J. V. Coffey was and still is the judge.

“(6) The compensation of respondent, Kowalsky, for his services in the matter of prosecuting the claims of said minor, as agreed upon between said Sullivan and respondent, was to be one-half of that which he (Sullivan) might receive under his (the said Sullivan's) agreement.

“(7) Such proceedings were had in the superior court (department No. 9) that prior to October 3, 1892, the status of Henry MacDonald, as the son and heir of C. E. S. MacDonald, was established in his favor; but an appeal to the supreme court had been taken, or was about to be taken, and there being other litigation pending, involving a large share of the estate, it was deemed judicious to compromise the matters in issue, and it was accordingly agreed upon; and on the 3d day of October, 1892, the respondent, Henry I. Kowalsky, appeared before Hon. J. V. Coffey, judge of department No. 9 of the superior court, in company with P. J. Corbett, guardian, and, as attorney for said Corbett, presented a plan of compromise, and an order authorizing said Corbett, as guardian of Henry MacDonald, to settle and compromise the matters of difference touching the estate of C. E. S. MacDonald, de-

ceased. The order was granted by the court, and a compromise made. The estimated value of the estate at the date of the settlement was, say, \$120,000, of which Henry MacDonald, by the terms of the compromise, become entitled to, say, \$40,000.

“(8) Prior to the 6th day of October, 1892, Hon. J. V. Coffey, judge of department No. 9 of the superior court, advised and instructed P. J. Corbett, guardian of Henry MacDonald, in the presence of Henry I. Kowalsky, to keep the funds of his ward, Henry MacDonald, intact, to deposit the same in bank, and not to make any payments therefrom except upon order of the court. The advice so given to Corbett was in unison with a practice which prevailed in the court of Judge Coffey, but which had not been, up to that date, published as a rule of his department of the superior court.

“(9) At the date of the directions so given by Judge Coffey to Corbett, the matter of the guardianship of Henry MacDonald was not, and never had been, pending in the department of Hon. J. V. Coffey, judge in department No. 9 of the superior court, but had been, was, and for some weeks thereafter continued to be, pending in department No. 10 of the superior court, presided over by Hon. W. H. Levy, Judge. Judge Coffey at that time supposed, and all the parties supposed, the matter of guardianship aforesaid was pending in his (Judge Coffey's) department.

“(10) On the 6th day of October, 1892, P. J. Corbett had in his hands funds of the estate of his ward, Henry MacDonald, paid him by James C. Pennie, Esq., administrator of C. E. S. MacDonald, deceased, amounting to \$7,000, less \$500 paid to Henry I. Kowalsky by said Pennie, and receipted for as cash by said Corbett, guardian, which funds were on deposit in the German Savings and Loan Society's Bank, except the \$500 paid to Kowalsky, as aforesaid. Jeremiah D. Sullivan had, at said last-mentioned date, paid out from his own funds, in the conduct of the case on behalf of Henry MacDonald, and in the support of said minor and his mother and family, the sum of \$2,200.

“(11) On said 6th day of October, 1892, Henry I. Kowalsky was about to leave by an evening train for Los Angeles, and both he and said Sullivan were desirous of receiving, as fees and compensation on account of services and expendi-

tures in the MacDonald case, the sum of \$3,500, making, with the sum already received, the sum of \$4,000. The parties, Corbett, Kowalsky and Sullivan, met on that day at the office of the latter, when the subject of such payment was broached to Corbett, who was willing to make the payment, but desired an order of the court authorizing the same. An order was drawn, and at about 1 o'clock P. M. Kowalsky repaired with it to the city hall to procure an order of allowance, etc., for \$4,000. Before leaving, it was suggested that, as the hour was becoming late, Kowalsky should, upon procuring the order, telephone to Sullivan, that Corbett might procure the funds from the bank before it closed. The order was presented by respondent to Judge Coffey in open court, and by him refused, because not itemized and verified, as required by the rules of his department. Kowalsky then left the courtroom of Judge Coffey en route for the clerk's office, to procure the data upon which to frame an itemized petition and order. On his way he called in at the courtroom of Judge Levy, to take leave of the latter before departing for Los Angeles, and, to the question of the latter of what brought him to the city hall, responded, 'To get an order from Judge Coffey in the MacDonald guardianship case,' and received for reply that the guardianship matter was in his (Judge Levy's) department, and not in that of Judge Coffey. Kowalsky repaired to the clerk's office, verified the statement of Judge Levy, and then returned to Judge Levy, told the latter he was correct, and asked for the order, which Judge Levy, knowing of the services rendered, was willing to grant, but was then informed by Kowalsky that he had made a like application to Judge Coffey, and that it had been refused, giving the reason therefor. Judge Levy responded that he had no such rule in his department, but that, under the circumstances, he (Kowalsky) had better comply with the rule, and bring it up regularly in court when the order would be granted. Kowalsky then telephoned to Sullivan that the case was not in Judge Coffey's court, but in that of Judge Levy, and that it would be all right. P. J. Corbett, who had remained at Sullivan's office, thereupon repaired to the German Savings Bank, drew \$3,500, and brought it to Sullivan's office. On the return of Kowalsky, he explained truthfully what had occurred at the city hall. Banking hours having closed, Corbett asked Sullivan what he was

to do with the money. Sullivan replied that he and Kowalsky were good for it, and he could pay it to them, and they would get the order from Judge Levy. The money (\$3,500) and Kowalsky's receipt for \$500 were then handed over, Corbett receiving the joint receipt of Sullivan and Kowalsky for \$4,000. A petition and order were then dictated by Kowalsky for the allowance by the court of the \$4,000 and written out by a typewriter. The money was divided—respondent, Kowalsky, receiving \$1,500 and his receipt for \$500 previously paid him, and Sullivan \$2,000. Kowalsky then departed to make preparation for his intended trip of that evening for Los Angeles, wrote a note to Judge Coffey, explaining the mistake in supposing the matter to be in his department, and apologizing for the trouble, etc. He also saw Judge Levy in the evening before starting, and told him the money had been paid over. Kowalsky was absent thereafter for some ten days to two weeks.

“(12) Neither Sullivan nor Kowalsky sought or intended to cheat, defraud, deceive, or mislead P. J. Corbett, the guardian, in any way in the premises, but acted in good faith, believing, and having good cause to believe, that, upon presenting the petition and order in proper form in the court of Judge Levy, the said order would be granted, and the guardian authorized to make the payment to them of \$4,000, and, had the same been presented in open court, it would have been allowed.

“(13) P. J. Corbett, the guardian, believed the order would be granted by the court upon presentation, and would not have made the payment but for such belief.

“(14) Immediately after Kowalsky left the office, Sullivan and Corbett repaired to the city hall with the petition and order allowing the payment of the \$4,000. The court of Judge Levy was not in session, but Sullivan found Hon. W. H. Levy, the judge thereof, in his chambers, and presented to him the papers for an order of allowance, as aforesaid. Judge Levy declined to sign the order until it should be regularly brought to a hearing in open court.

“(15) The value of the services rendered by Sullivan and Kowalsky as attorneys in the case of Henry MacDonald, hereinbefore mentioned, were at least equal to the amount of \$4,000, and probably greatly in excess of that sum; but no order of any court or judge authorizing the guardian to pay

any sum of money to them, or either of them, had been obtained or made, prior to October 6, 1892, or prior to the payment of the money on said last-mentioned day.

“(16) The respondent Kowalsky has not, as charged, evaded or disobeyed any lawful or other direction of any judicial officer, except as hereinbefore stated in reference to the instructions of Hon. J. V. Coffey, as to deposit of trust fund in bank by the guardian, and as to the payment of the same out only on the order of the court. Such instructions having been given in a case in which Judge Coffey had then no jurisdiction, and to a guardian over whom he had no authority, it becomes a question as to the binding force and effect thereof.

“(17) The matter of the guardianship by P. J. Corbett of Henry MacDonald was prior to December 12, 1892, transferred to department No. 9 of the superior court, and on or about the last-mentioned date, the account of the said Corbett coming before the court for settlement, the item of \$4,000 contained therein, on account of moneys paid to the respondent and Sullivan, was disallowed by the court, and charged to P. J. Corbett as guardian.

“Respectfully submitted,

“NILES SEARLS,

“Committee.”

We think that the foregoing findings of the commissioner are fully justified by the evidence, and present a correct and fair statement of the facts in the case; and, after a careful consideration of the matter, we are satisfied that these facts would not warrant us in rendering any judgment against the accused. The prayer of the accusation is denied and the proceeding dismissed.

RITCHEY v. McMICHAEL.

No. 19,231; December 26, 1893.

35 Pac. 151.

Agency—Deceit of Agent in Buying Land.—Plaintiff authorized defendant to buy for him land from one B. for \$2,750, agreeing to pay one-third cash, one-third in six months, and the balance in a year. Thereafter defendant represented that B. would not sell except for one-half cash and the balance in a year; that he had taken a deed to himself on those terms, and would convey to plaintiff on the terms agreed on between them. He then forwarded a contract of sale to plaintiff and drew on him for \$916.66. Plaintiff executed the contract and paid the draft. Defendant's representation as to his purchase of the land from B. was false, B. having agreed to sell it to another for \$1,375. Held, that plaintiff could recover the amount paid on the draft.

Agency—Fraud of Agent—Accounting.—In such case the relation of principal and agent existed between plaintiff and defendant, and the latter was accountable for the money paid him by plaintiff to carry out the purposes of the agency.

APPEAL from Superior Court of Los Angeles County;
William P. Wade, Judge.

Action by J. T. Ritchey against J. G. McMichael for moneys of plaintiff fraudulently converted by defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

Anderson & Anderson for appellant; Lacey & Trask and D K. Trask for respondent.

HARRISON, J.—In April, 1888, one Buell was the owner of an interest in certain lands in Los Angeles county and the defendant was the owner of a similar interest therein. The defendant was a resident of California, but was at that time in Louisville, Kentucky, where he had formerly resided, and where the plaintiff was then residing. He had known the plaintiff and had been on friendly terms with him for many years, and while there represented to him and one Curtice that Buell would sell his interest in the lands for \$2,750, and urged them to purchase this interest, representing that it was of

much greater value, and offered to make the purchase for them at the lowest price for which he could induce Buell to sell it. Neither the plaintiff nor Curtice had ever seen the lands, nor had they any knowledge of their value, or of the price at which Buell would sell his interest, but, relying upon the representations of the defendant, authorized him to make the purchase for them from Buell on terms of one-third cash, one-third in six months and one-third in twelve months, thereafter. The defendant returned to California, and on the 9th of May wrote to the plaintiff to the effect that he had effected the purchase, but that Buell would not accept the terms proposed, but insisted on having half cash, and half in twelve months; and therefore he had had the contract from Buell made directly to himself upon these terms, but that the plaintiff and Curtice might have the benefit of the terms upon which they had agreed to make the purchase. Inclosed with the letter he sent a contract in duplicate to be executed by the plaintiff and Curtice, one of which they were to retain, and the other to return to him, by which he agreed to sell, and they to purchase from him, these lands for \$2,750, payable one-third cash, one-third in six months, and one-third in twelve months, the deferred payments to be evidenced by their promissory notes; and at the same time made a draft upon them for \$916.66. The draft was paid by them upon its presentation, but neither the contract nor the notes were executed or returned to him. When the second payment was about to mature, the plaintiff telegraphed the defendant to make his draft for both deferred payments with a deed attached and they would be paid. To this request the defendant paid no attention, and does not appear to have made any subsequent attempt to collect the money. Subsequent investigation having satisfied the plaintiff that the defendant had defrauded them in the transaction, he brought this action to recover the amount of money paid on the draft, setting forth in his complaint the facts constituting the fraud, and that Curtice had assigned to him his interest in the money. The court finds that the representations of the defendant to the plaintiff in his letter of May 9th were false and untrue; that at the time he was in Kentucky, urging the purchase of Buell's interest for \$2,750, Buell had authorized him to sell that interest for \$1,650; that Buell did not refuse to sell the property upon the terms proposed by

the plaintiff and Curtice, and that the defendant had never made such offer on their behalf to Buell; that defendant did not give Buell half of the purchase price in cash, and had not taken the property in his own name or given Buell any cash; that, on the contrary, Buell did agree to sell his interest to a Mrs. Canine for \$1,375, in terms of one-third cash, one-third in six months, and one-third in twelve months. The agreement for this sale was dated May 9, 1888, but the cash payment thereon—\$458.33—was not made until July 24th. The defendant offered in evidence a deed from Mrs. Canine for this interest, purporting to have been made by her on May 9th, but which was acknowledged on the 15th of September, in the state of Kentucky. It does not appear that Mrs. Canine ever became the owner of the land, or that Buell ever made any conveyance of the land to anyone. The court found that the defendant procured the \$916.66 to be paid to him upon his draft by means of false and fraudulent representations, and that he had been guilty of fraud and deceit in the transaction, and rendered judgment in favor of the plaintiff.

The rule is so familiar as to be trite that the obligation of an agent to his principal demands of him the strictest integrity and the most faithful service. He is not permitted to acquire any adverse interest in the subject matter of the agency, and is accountable to his principal for any gains that he may have made in violation of those obligations. So long as he retains his position of agent he is accountable to his principal for all property which he may have received from him with which to carry out the purpose of his agency, and for the faithful disposition of his property in accordance with the principal's directions. The defendant herein must be regarded as the agent of the plaintiff in all his transactions respecting the purchase of the lands in question. He had undertaken to effect the transfer of Buell's interest in the lands to the plaintiff and Curtice as their agent, and while that relation existed between them he was not at liberty to acquire any interest in the lands adverse to them. Even if it had been established at the trial that he had made a contract in his own name for the purchase from Buell of this interest, his relation to the plaintiff and Curtice would have made him a trustee of that interest for their benefit. In the first letter which he wrote to the plaintiff upon his return to California, in which

he sent the notes and contracts for execution, he says: "Buell would not take one-third cash, one-third six months, one-third twelve months, but insisted upon one-half cash; so I had him to contract to me one-half cash, one-half twelve months, and make the terms to suit you all. The difference is small, and I gave it to him so as to fix you all up." And again: "I have taken the property in my own name, and consented to your terms, and I pay Buell one-half cash, one-half twelve months." And on the next day he telegraphed from California to the plaintiff: "Papers gone forward, and draft for one-third of the amount." The scheme which the defendant fraudulently devised for the transfer to Mrs. Canine of the right to purchase Buell's interest, and her assignment of this right to himself, did not divest him of his obligation to fidelity toward the plaintiff, or give to him any rights in the property which he could assert as against the plaintiff and Curtice. The money which the plaintiff and Curtice paid upon the defendant's draft was not for the purpose of discharging any obligation on their part to the defendant, or in pursuance of any transaction between them and the defendant as separate contracting parties, but it was merely placing that amount of money in his hands as their agent for the purpose of carrying out the object of the agency; and as soon as they learned that their agent had not applied this money as they had directed, but had proved faithless to his trust, they had the right to demand its return. Whether the money was paid upon the draft of the defendant, or had been personally placed in his hands, or forwarded to him, is immaterial. In either case it was at all times the money of the plaintiff and Curtice, given to the defendant for a special purpose.

The proposition of the appellant that the plaintiff cannot recover the amount of the draft without tendering to the defendant an assignment or reconveyance of any interest he may have in the lands cannot be maintained. The relation of vendor and vendee never existed between them, nor was there ever any contract between them which required a rescission. The defendant could not, as we have seen, so long as he held the relation of agent to the plaintiff for the purchase of these lands from Buell, acquire any interest therein which he could hold as against his principals, or of which he could become the vendor. Equally untenable is the proposition that, inasmuch

as the defendant was himself the owner of an interest in the lands equal to that of Buell, the contract between himself and the plaintiff is valid, and that the plaintiff cannot recover the money sued for until the defendant has made default upon this contract. The plaintiff never had any negotiations with the defendant for the purchase from him of his interest in the lands, and the defendant could not become the vendor of this interest without the assent of the plaintiff to purchase it. Even if he had intended to assume the relation of a vendor of his own interest, the agreement sent by him to the plaintiff can only be regarded as a proposition or offer from him, and would not be binding upon the plaintiff until his acceptance; and it is not claimed that the plaintiff ever executed the agreement, or manifested to the defendant any acceptance of the proposition. The money which he paid upon the defendant's draft was not upon any agreement to purchase the defendants' interest, but was for the purpose of making a payment for the Buell interest. If the defendant made a fraudulent use of this money, the plaintiff could at any time at his discretion repudiate his action and sue for the money. The judgment and order are affirmed.

We concur: Garoutte, J.; Paterson, J.

IN RE DE LEON'S ESTATE.

No. 15,367; December 27, 1893.

35 Pac. 309.

Appeal—Dismissal.—Where the Transcript on Appeal Does not Show that the findings of fact and conclusions of law set out in it were signed by the trial judge and filed with the clerk, and that judgment was entered upon such findings and conclusions, as required by Code of Civil Procedure, sections 632, 633, the appeal will be dismissed.¹

¹ Cited and approved in *Ford v. McIntosh*, 22 Okl. 424, 98 Pac. 341, where the court dismissed an appeal, the record containing no copy of the judgment and failing to disclose that any had been rendered, while the certificate of the trial judge to the bill of exceptions was insufficient under the statute to correct the omissions.

APPEAL from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceedings by Virginia Durstein to have allotted to her a share in the estate of Jose Francisco De Leon, deceased. Decree for plaintiff. The assignee of one of the distributees of said estate appeals. Dismissed.

T. M. Osmont for appellant; Lloyd & Wood and L. D. McKisick for respondent.

FITZGERALD, J.—The appeal in this case purports to be from a judgment upon the judgment-roll with a bill of exceptions. There are so-called “findings and conclusions of law” set out in the transcript, but they do not appear to have been signed by the judge or filed with the clerk; nor was there any judgment entered thereon, as required by sections 632, 633 of the Code of Civil Procedure. With the exception of a statement in the bill of exceptions that a “decree was rendered in favor of the petitioner as in said decree set forth,” there is nothing in the record showing that any judgment was ever rendered by the court. This point was not made by counsel, either in their arguments or briefs, for the reason, perhaps, that they supposed that the judgment had been regularly entered upon the decision, and that, as the appeal had been taken upon the judgment-roll, it was necessarily contained therein. If, however, it should be made to appear within the time allowed to file a petition for rehearing that the judgment was in fact entered upon the decision, but was inadvertently omitted from the transcript, then the judgment herein will be set aside, and counsel permitted, upon a suggestion of diminution of the record, to supply the omission. Appeal dismissed.

We concur: De Haven, J.; McFarland, J.

January 26, 1894.

By the COURT.—Ordered that the judgment heretofore rendered in this cause on December 27, 1893, be and the same is hereby vacated and set aside, and, upon stipulation of the parties filed herein, further ordered that the case stand submitted upon the amended record, and upon the briefs now on file.

NEVIN v. THOMPSON et al.

No. 19,318; December 28, 1893.

35 Pac. 160.

Bond to Secure Note—Action to Enforce—Pleading.—A complaint averred that defendant T. gave to plaintiff a note for \$700; that, six months afterward, defendants D., as principal, and S. and C., as sureties, gave T. a \$3,000 bond, which was set out, conditioned that whereas T. and T. J. C. (who was not made a party) "are now indebted to parties hereinafter named in the sums set opposite each name, and that the purpose of this obligation is to relieve the said T. from any and all liability on said indebtedness, as follows, and we hereby agree to assume and pay the same, to wit, two promissory notes of \$700 each, and the interest thereon: . . . Now, if the said T. J. C., or any of the parties save and except the said T.," shall pay such sums, the bond shall be void, etc.; that T. was then indebted to plaintiff on two notes, one of which is the one sued on; and that the only indebtedness from T. to plaintiff was that evidenced by such notes. Held, that such complaint was not subject to a general demurrer, because the bond was to relieve T. from liability on a joint indebtedness of T. and T. J. C., while the debt sued on was T.'s only.

Bond to Secure Note—Action to Enforce—Parties.—Nor was such complaint demurrable because T. J. C. was not a party, as he was not a necessary party.

Bond to Secure Note—Action to Enforce.—Such Complaint was not defective for uncertainty as to whether the suit was on the note or on the bond.

APPEAL from Superior Court, San Diego County; W. L. Pierce, Judge.

Action by Nathan Nevin against Frank C. Thompson, T. J. Daley, A. R. Schulenberg and H. T. Christian on a promissory note executed by Thompson, and on a bond whereby the other defendants assumed and agreed to pay such note; and also to reform such bond. From a judgment for plaintiff, defendants appeal. Affirmed.

J. L. Copeland and Gibson & Titus for appellants; J. Z. Tucker for respondent.

TEMPLE, C.—This appeal is upon the judgment-roll. The complaint shows that defendant Thompson, in June, 1890, executed and delivered to plaintiff a promissory note for the sum

of \$700, which note plaintiff still owns and holds, and which has not been paid; that, on the eleventh day of December following, the defendants Daley, Schulenberg and Christian executed and delivered to defendant Thompson an instrument in writing, which is set out in the complaint. This instrument, it was averred, as written, did not truly express the intention of the parties to it, and the plaintiff asked to have it reformed. This was done, and no point is made here as to that procedure. As it is alleged the parties meant to have it read, and as it is made to read by the judgment and decree of the court, it is a penal bond executed by Daley as principal, and Schulenberg and Christian as sureties, who are held and firmly bound to Thompson in the sum of \$3,000, jointly and severally; and is conditioned "that whereas the said Frank C. Thompson and one Thomas J. Cambron are now indebted to the parties hereinafter named in the sums set opposite each name, and that the purpose of this obligation is to relieve the said Frank C. Thompson from any and all liability on said indebtedness, as follows, and we hereby agree to assume and pay the same, to wit, two promissory notes of \$700 each, and the interest thereon: . . . Now, then, if the said Cambron, or any of the parties save and except the said Thompson, shall well and truly pay the said amounts, then this obligation is to be null and void, and otherwise to remain in full force and effect." It is alleged that Thompson was then indebted to plaintiff upon two notes, one of which is the note set out in the complaint, and that the only indebtedness from Thompson to plaintiff was that evidenced by the two notes. It is then averred that these notes are wrongly described in the bond, and the court is asked to reform the instrument so as to correctly describe them.

The complaint was demurred to generally for insufficiency of the statement of facts; for uncertainty as to whether the suit is on the note or bond; for nonjoinder of Cambron as a party defendant; and for misjoinder, in that Christian is not a proper party defendant. The point is made that the bond is to relieve Thompson from liability upon a joint indebtedness of Thompson and one Cambron, while the indebtedness upon which suit is brought is an indebtedness of Thompson alone. Therefore, as Daley, Schulenberg and Christian have only undertaken to pay a joint indebtedness of Thompson and Cambron, it does not appear that they have undertaken to

pay the debt averred. This point is certainly very plausible, but I think must be overruled. The complaint is undoubtedly very defective, but the objection is raised only on general demurrer. That does not reach a case where the facts are insufficiently stated, if it can be seen that the facts inartificially stated would, if properly stated, have been sufficient. The complaint does substantially aver that the indebtedness sued upon is the same as that described in the bond, and, the bond being a part of the complaint, a correct description is there found, and, as against a general demurrer, this allegation, which amounts to a statement that the debt described and sued upon is the debt assumed by the appellant, is enough. Nor is the other description of the indebtedness, as an indebtedness of Thompson upon a promissory note, which appears to have been signed by Thompson alone, absolutely inconsistent with the statement in the bond that the indebtedness is that of Thompson and Cambron. Both may be true. The indebtedness may have been a joint one, although secured by the note of Thompson alone. As to this general demurrer, if this could be so, we must assume it. The findings do, in fact, show that the note was signed by Thompson and indorsed by Cambron, and it is said that they were given for a horse purchased from plaintiff by Thompson and Cambron. This is, of course, only stated in lieu of a supposable case showing that the statements may both be true.

Although Cambron was also liable for the debt, it was not necessary to make him a defendant in this case, and the defendants are not injured by the fact that his liability is not more particularly averred.

There is no uncertainty as to whether the appellants are sued on the bond. They cannot doubt that it is sought to hold them liable upon it, and it is equally plain that they are not sued upon the note. As to them, at least, the averments as to the note are mere matters of inducement showing the consideration of their promise. No other points are raised here, and, if other objections might be suggested, they are not decided. The judgment should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

PACIFIC MUTUAL LIFE INSURANCE COMPANY v.
BECK et al.

No. 15,332; December 28, 1893.

35 Pac. 169.

Mortgage Foreclosure—Purchase by Mortgagee—Rents.—Where a Receiver was appointed in a suit to foreclose a mortgage, and the mortgagee purchased the mortgaged premises at the foreclosure sale for the full amount of his debt and costs, the rents and profits of the mortgaged premises in the hands of the receiver at the time of the sale belonged to the mortgagor and not to the mortgagee.

Mortgage Foreclosure—Purchase by Mortgagee—Rents.—The mortgagee did not become owner by purchasing at the foreclosure sale, so as to entitle him to rents payable ten days after the sale, since his title was not changed thereby, except that the amount of his debt was fixed, and his right to a deed or to a sum paid to redeem within six months became absolute.

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by the Pacific Mutual Life Insurance Company against John Beck and Priscilla Beck and another to foreclose a mortgage. From an order directing a receiver of the mortgaged property to pay rents and profits in his hands to the mortgagor, the mortgagee appeals. Affirmed.

Kellogg & King and Fox, Kellogg & King for appellant; J. W. Harding for respondents.

TEMPLE, C.—This appeal is from an order made after judgment. The action was to foreclose a mortgage executed by the defendants Beck to plaintiff, in which it was stipulated that, when proceedings to foreclose were instituted, a receiver might be appointed.

November 17, 1890, a suit to foreclose having been commenced, an application was made for the appointment of a receiver. By consent a receiver was appointed, who in the order was directed and authorized “to take charge of the property, and prevent waste thereon, and to collect and receive the rents and profits thereof, and especially to farm or

lease or cultivate said land, and to care for, protect, and at the proper time harvest and thresh or otherwise prepare for market and sell the product of said premises, holding the same and all moneys collected or received by him hereunder subject to the further order of this court in that behalf, reporting to the court, from time to time, his doings hereunder," etc. The receiver was appointed and duly qualified, and took possession of the mortgaged premises, which consisted of a farm.

In pursuance of the authority, the receiver leased the property for the cropping season of 1891, "but in no event to exceed nine months from January 1, 1891, at the rent of one-fifth of all crops raised thereon during said demised term, payable as follows: Hay, well baled; wheat, barley, and similar products, sacked in good sacks,—and all the foregoing products delivered in a seasonable time for harvesting and gathering same at warehouse in Livermore, free of all expense to receiver." The proceedings not having been ended in 1891, the lease was renewed for the cropping season of 1892 on the same terms. Besides the terms above recited, the lease contained a stipulation that the tenant would cultivate the land "in a farmer-like manner, using the same for the purpose of raising hay, wheat, barley, and similar crops."

The questions involved in this appeal have reference to the crops of 1892. They were all harvested, and the portion paid as rent was delivered in the warehouse, as stipulated, before September 7, 1892. At that time the receiver obtained warehouse receipts for it. On the twenty-first day of September, 1892, the premises were sold under a decree of foreclosure entered in the suit. At that sale the mortgagee purchased, paying the full amount of its debt and costs. September 30, 1892, the receiver filed a report, showing that he had in his hands hay, wheat, and barley, the crop of 1892. Thereupon a contest arose between appellant and the defendants Beck, each claiming the property. It was given to the defendants, and plaintiff appeals from that order.

As the mortgage debt and all costs had been fully paid, it is difficult to comprehend upon what rational ground the mortgagee can claim the crops which were in the hands of the receiver. Counsel argues that the rents were collected by the receiver for the purpose of having them applied to the mortgage debt. Let that be admitted; still they did not belong to the mortgagee. They were held as security only. The

mortgagee was not entitled to his debt and the rents and profits, but to his debt only. The debt having been fully paid from the property of the debtor, the securities which remain belong to the debtor.

Counsel seem to argue in the opening brief that the lease did not expire until October 1st, and they put in proof that it was generally thought that the cropping season ended at that time. They then contend that the rents were not due until the end of the term, and that plaintiff, when he purchased the mortgaged premises at the foreclosure sale, which was nine days before October, became the owner of the premises, and, as such, entitled to all rents which fell due after his purchase. I think it clear that counsel are mistaken in all these propositions. The term expired at least as soon as the crops were harvested and removed from the premises. The term was for the cropping season, and it was stipulated, in effect, that the premises were to be used for the purpose of raising these crops only. If, however, it be conceded that the term continued until October, the crops were to be delivered to the receiver as soon as convenient after harvesting, "in a seasonable time after the proper and suitable time for harvesting and gathering same." If they had not been so delivered, it would have been the duty of the receiver to compel such delivery. And, lastly, if it be admitted that the rent was payable after the sale under the foreclosure, still the plaintiff would have no right to them. He did not become owner by purchasing at the sale. His title was not at all changed by that fact, except that the amount of his debt was fixed, and his right to a deed, or a sum paid to redeem within six months, absolute. His rights as purchaser are carefully defined in the Code of Civil Procedure.

It is suggested, rather than clearly stated, that his title dates back to the date of the mortgage. It cannot be that it is really claimed that any such relation affects plaintiff's rights in this case. The relation is allowed only to cut off intervening rights, but the purchaser has the rights of an owner only when he becomes entitled to his deed: *Jones on Mortgages*, sec. 1661. I advise that the order be affirmed.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

WHELOCK v. GODFREY et al.

No. 15,236; December 28, 1893.

35 Pac. 315.

Judgment—Payment.—Where Judgment is Rendered against a savings bank for a deposit with accrued dividends, the creditor having leave to apply for any relief needed to fix the amount and enforce payment, and later a decree is entered fixing the amount due to date at a certain sum, for which judgment is rendered against the bank, the first judgment is interlocutory, and payment of the second discharges both.¹

Interpleader—Payment of Judgment.—Where a Defendant has Disclaimed interest except as stakeholder, and prayed interpleader, and judgment is given against it in accordance with his own prayer, with costs against the defeated claimant, it may safely pay the judgment, in spite of irregularities in the interpleader suit which are uncomplained of by said claimant.

APPEAL from Superior Court, City and County of San Francisco; Walter H. Levy, Judge.

Action by Almon Wheelock, executor of Albert G. Wheelock, deceased, against Arabella Godfrey and the San Francisco Savings Union, for certain money deposited in defendant bank by deceased. From a judgment for defendant Godfrey against the bank, the bank appeals. Affirmed.

H. C. Campbell and Clunie & Clunie for appellant; Wm. Barber for respondents.

SEARLS, C.—Almon Wheelock, executor of the last will of Albert G. Wheelock, brought an action to set aside and declare null and void an assignment made by Albert G. Wheelock, deceased, to defendant Arabella Godfrey, upon the ground of the mental incapacity of said Wheelock to execute the same, and fraud on the part of said Godfrey in procuring the execution of such assignment, and also to recover from both the defendants the sum of money assigned. Albert G. Wheelock, plaintiff's testator, according to the complaint, had on deposit

¹ Cited in the note in 92 Am. St. Rep. 780, on merger of judgment in judgment.

with the San Francisco Savings Union, an incorporated bank of savings, one of the defendants and the appellant herein, the sum of \$7,045.89, for which he had a bank-book. On the first day of October, 1888, said Wheelock assigned his said demand and bank-book to the other defendant, Arabella D. Godfrey, the respondent herein, who thereupon procured the amount aforesaid to be transferred by the bank to her credit, and in evidence thereof the issue of a bank-book showing such credit to her. The bank defendant answered the complaint, and also filed a cross-complaint, in both of which it admitted the deposit by Wheelock of the \$7,045.89, the issue of a bank or deposit book to him, wherein he was credited therefor, and avers the due assignment thereof to defendant Godfrey, and the issuance to her of a bank or deposit book, and a credit to her of the amount thereof on its books, etc. And in its further answer or cross-complaint it avers that the plaintiff and defendant Godfrey each claim said sum of money; that one of them is entitled thereto, with the dividends thereon, and that it has no means of knowing or ascertaining which of them is entitled thereto; except by the determination of the court in the premises; that it is willing to pay the same when the ownership is determined, and has no interest in the question except to hold the money according to the terms of the deposit, and to pay it to the party entitled thereto. Defendant prays that plaintiff and defendant Godfrey be required to interplead, and that the court, by its judgment, determine which of them is the owner and entitled to said money deposit and dividends thereon. No answer was filed to this so-called "cross-complaint" by either plaintiff or defendant Godfrey. The cause was tried by the court, written findings filed, and judgment entered as follows: (1) In favor of both of the defendants, as against the plaintiff; (2) that, as between the defendants, the sum of \$7,045.89, which by the answer of the bank defendant is admitted to be held by it on deposit in the name and to the credit of defendant Godfrey, belongs to her, together with any and all dividends that have accrued thereon; and it was further decreed that she recover the same, and that she be at liberty to apply to the court for any further relief that may be necessary to ascertain the amount due her by the terms of this decree, and to enforce payment thereof. This decree was entered September 18, 1891. On the thirtieth

day of October, 1891, a further decree was entered, as between the defendants, which recited that, in pursuance of the permission granted in the former judgment entered, testimony had been introduced, from which it appears that the amount due to date (October 30, 1891) on the deposit referred to in said judgment is \$8,302.16. Judgment is rendered in favor of defendant Godfrey, and against the bank defendant, for said amount.

The bank defendant has taken an appeal from each of said judgments, and in each case the cause comes up on the judgment-roll; this appeal being from the last or final judgment. As they are submitted together, it may be said here the first judgment or decree was, as between the defendants, an interlocutory judgment, which simply established the right to the deposit, but left the amount of the recovery thereon to be adjudicated and crystallized in the final judgment rendered October 30, 1891: Freeman on Judgments, secs. 29-33. We do not doubt that a satisfaction of the last judgment will extinguish the first, and all the rights of defendant Godfrey acquired thereunder. It must be admitted that there are serious defects in the record, some of which are inexplicable, growing out of the filing of an amended complaint pending the trial. These do not, however, affect this appellant, which occupies the position of a stakeholder as between the other parties. No judgment was rendered against it either on the original or amended complaint, but, on the contrary, it had judgment for costs against the plaintiff. The judgment rendered against it was in consonance with the prayer of its answer and cross-complaint. It stands indifferent, as between the other parties to the action; and the controversy having been settled as between them, and the deposit awarded to defendant Godfrey, it was in order for it to pay the demand, as it expressed a willingness to do. There were, however, good reasons apparent why appellant here should exercise due caution in the premises by not paying the demand until a final adjudication between plaintiff and its codefendant; and it may fairly be presumed this consideration was an important inducement to this appeal.

The judgment appealed from should be affirmed, each party to pay his own costs on appeal.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed, each party to pay his own costs on appeal.

WHEELOCK v. GODFREY et al.

No. 15,234; December 28, 1893.

35 Pac. 320.

Findings—Definiteness.—A Finding That All the Averments of a complaint, down to and including a certain averment, are true, is sufficiently explicit.

Gift—Finding as to Undue Influence and Incompetency.—Where an attempt is made to avoid a gift on the ground of mental incompetency and undue influence, a finding that there was no incompetency or undue influence is sufficient, without finding as to the donor's physical condition or other facts stated as inducement to the ultimate facts.

Judgment.—Where One Brings an Action Against Two parties for a fund, the judgment being against him as to both, he cannot complain that it is in favor of one defendant as against the other.

APPEAL from Superior Court, City and County of San Francisco; Walter H. Levy, Judge.

Action by Almon Wheelock, executor of Albert G. Wheelock, deceased, against Arabella Godfrey and the San Francisco Savings Union, for certain money deposited in defendant bank by deceased. Judgment for defendants. Plaintiff appeals. Affirmed.

Clunie & Clunie and H. C. Campbell for appellant; William Barber for respondents.

SEARLS, C.—This is an appeal by plaintiff from a final judgment in favor of defendants. The cause comes up on the

judgment-roll, and, as the appeal was not taken within sixty days after the entry of judgment, the appeal must be determined upon the questions presented by the pleadings, findings and judgment. An appeal from an order denying a new trial in the same case this day decided (100 Cal. 578, 35 Pac. 317) contains a sufficient reference to the facts in the case, and they will not be repeated here.

The first finding is to the effect that all the allegations of plaintiff's complaint, from the commencement thereof down to and including the averment that the moneys referred to in the complaint, viz., \$7,045.89, were still in charge of the defendant bank, are true. It is objected to this finding that it is impossible to determine from it the averments found true and those not sustained. It is as comprehensive and explicit as the complaint to which it refers, and, as it finds all the averments of the complaint true down to and including a given averment, we fail to see any difficulty in determining precisely what the court means. The averments thus found true may be epitomized as follows: Defendant Arabella D. Godfrey is a widow; the other defendant is an incorporated savings bank. On the 1st of October, 1888, Albert G. Wheelock (plaintiff's testator) had deposited \$7,045.89 in the bank for loaning and safekeeping, and had received in evidence thereof a bank-book, in which he was credited for the amount as a deposit. On or about October 1, 1888, defendant Godfrey presented to the bank this deposit-book, with an assignment thereof in writing, purporting to be executed by Wheelock, assigning the said money and account, and demanded a transfer and delivery to her of said moneys. The bank, in pursuance of said demand, transferred to her credit on its books the amount, and gave her a deposit-book, crediting her therein for the amount. The money has not been drawn from the bank, and it is still in its charge and custody. The court then proceeds to find at length, what need only be referred to briefly, that on October 1, 1888, the said instrument of transfer was signed, executed and delivered by Wheelock to defendant Godfrey, and that, when so executed and delivered, he was not of weak or unsound mind, or mentally incompetent to make the transfer, but was of sound mind, and competent to make such transfer; that the assignment was not procured by or through undue influence or control by Godfrey over Wheelock,

nor by any unfair advantage, nor by any advantage taken of the mental or physical weakness or unsoundness of mind of Wheelock; that he was not induced to sign the assignment or transfer by any fraud or undue influence of defendant Godfrey or anyone else; that the assignment and delivery were not procured by duress, fraud or undue influence, etc., by Godfrey or anyone else; that Wheelock was free from fraud, duress, menace or undue influence at the time and in the matter of the making, signing and delivery of said assignment. The court then finds the allegations of the complaint in reference to the death of Wheelock, his last will, and proceedings had thereunder as true.

These findings cover all the material issues in the case. It was not necessary to find whether or not Wheelock had been ill or paralyzed, or as to his physical condition, or any other fact stated in the complaint, merely as inducement to the ultimate facts, which were that he was mentally incompetent, and that defendant Godfrey knowingly and fraudulently took advantage of his weakness, and, by undue influence, by duress, and by obtaining control over him, induced and procured him to sign, execute and deliver to her an assignment of his bank-book and of the money in bank. The findings are full and complete on the material issues. The objection to that portion of the judgment which awarded the money in bank to defendant Godfrey, as against the bank, is not open to attack by this appellant, who was plaintiff in the court below. The judgment is against plaintiff and in favor of both the defendants as to him. If he was not entitled to it, manifestly he is not, and cannot be, injured by any judgment in the premises awarding it, as between the defendants. That is not his affair, but theirs. The judgment appealed from should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

ESREY v. SOUTHERN PACIFIC COMPANY.

No. 15,440; December 29, 1893.

35 Pac. 310.

Appeal—Time of Taking—Dismissal.—An appeal from an order denying a new trial, not taken within sixty days after the order is entered on the minutes of the court (Code Civ. Proc., sec. 939), will be dismissed.

APPEAL from Superior Court, Tulare County; W. W. Cross, Judge.

Action by Nannie Esrey against the Southern Pacific Company, in which defendant appealed from the judgment in favor of plaintiff, and from an order denying its motion for a new trial. Plaintiff moves to dismiss both appeals. Motion to dismiss appeal from such order granted. Motion to dismiss appeal from the judgment denied.

Foshay Walker for appellant; Justin Jacobs for respondent.

PER CURIAM.—Motion to dismiss the appeals. Judgment was rendered in this case in favor of the plaintiff February 8, 1892, and an order denying the defendant's motion for new trial was made and entered May 24, 1893. The defendant appealed from the judgment February 1, 1893, and from the order denying a new trial August 14, 1893. The plaintiff now moves to dismiss the appeal from the order denying a new trial, upon the ground that it was not taken within sixty days after the entry of the order.

The right of a litigant to have the action of the lower court reviewed by this court upon an appeal therefrom depends upon a compliance by him with the statutory requirements for taking an appeal. Section 939, Code of Civil Procedure, limits the time for taking an appeal from an order granting or refusing a new trial to sixty days after the order is made and entered in the minutes of the court, and, unless taken within that time, this court has no jurisdiction to hear the appeal. The appeal from the order denying a new trial, not

having been taken within sixty days after the entry of the order, must therefore be dismissed.

The plaintiff has also moved to dismiss the appeal from the judgment upon the ground that the transcript was not filed within the time limited by rule 2 of this court, or within the time limited by any order of the court or stipulation of the parties. The time for filing the transcript was extended by stipulation until forty days after the decision of the lower court upon the motion for a new trial, in order that, if the motion should be denied, a single transcript might serve for both appeals. If the motion should be granted, the defendant would have no occasion to appeal. We are of the opinion, however, that the facts and circumstances presented in the affidavit on behalf of the appellant in opposition to this motion are such as to excuse its failure to file the transcript prior to receiving the plaintiff's notice of motion to dismiss the appeal: See *Carter v. Paige*, 77 Cal. 64, 19 Pac. 2.

The motion to dismiss the appeal from the order denying a new trial is granted and the motion to dismiss the appeal from the judgment is denied.

FIRST NAT. BANK OF CHICAGO v. CALIFORNIA NAT. BANK OF SAN DIEGO.

No. 19,261; December 29, 1893.

35 Pac. 639.

Money Loaned—Evidence.—G., Plaintiff's Vice-president, being at the C. Hotel in defendant's town, was asked by the latter's president for a loan on collateral, \$25,000 to \$40,000, and agreed to make it on proper security. N., who was present, writing G. about a note which said president proposed to send, "to obtain this loan, as I understand it," gave his opinion about certain notes, defendant's stock, etc. A note for \$25,000 was made to G., vice-president, by four of defendant's directors and its cashier. The president, in sending the collaterals, wrote G. that he believed they were, in substance, "about what was spoken of at the C. Hotel when Mr. N. was with us." On receipt of the collaterals, plaintiff credited defendant with \$25,000, less dis-

count, and paid it on defendant's orders. Held, that a finding that plaintiff lent defendant \$25,000 was justified.¹

Money Loaned—Evidence.—In an Action by One Bank against another on a note, and for money loaned, where defendant asserts that plaintiff bought the note, proof of the negotiations for the loan and that defendant received its proceeds is not incompetent as varying the written instrument.¹

Money Loaned—Evidence.—In an Action by One Bank against another for money loaned, and on a note representing the balance due, the loan and balance being established, it is immaterial whether the note was authorized by the directors.

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action by the First National Bank of Chicago against the California National Bank of San Diego on a promissory note, and for money loaned. Judgment for plaintiff. Defendant appeals. Affirmed.

Luel & McDonald for appellant; Tippet, Boone & Neale for respondent.

SEARLS, C.—This appeal is prosecuted from a final judgment in favor of plaintiff and from an order denying motion for a new trial. There are three counts in the complaint, as follows: (1) Upon a promissory note for \$12,500, dated October 19, 1881, made by "California National Bank, per J. W. Collins, Pres.," upon which a payment of \$2,500 was admitted; (2) a cause of action upon an overdraft for \$9,862.95, which was admitted, except that defendant claimed that the \$2,500 credited in the first cause of action should be applied to the second; (3) a cause of action for the recovery of \$25,000, loaned by plaintiff to defendant May 18, 1891, with a credit thereon of \$15,000.

The findings are in favor of plaintiff, and are sufficient to support the judgment. By the second finding it appears that "the first and third counts of plaintiff's complaint relate to the same indebtedness." According to these findings, the plaintiff on the eighteenth day of May, 1891, loaned to the defendant \$25,000 at defendant's request; that defendant paid

¹ Cited in the note in 128 Am. St. Rep. 629, on parol evidence of conditions in bills and notes.

the interest thereon up to the nineteenth day of October, 1891, and \$12,500 on account of the principal, and that on said last-named date the defendant made its promissory note to the plaintiff for \$12,500, being for the balance due on account of said loan, payable thirty days after date, with interest at seven per cent per annum; that defendant received the consideration for said note; that the same is due and unpaid, except the sum of \$2,500, paid thereon December 22, 1891. The court further finds, as to the \$2,500, that it was not collected for the use of the defendant, as averred in the answer, but was collected by the plaintiff on a promissory note deposited with it by defendant as collateral security for the \$12,500 note of plaintiff, etc.

The contention of appellant is that the finding of the court that plaintiff loaned to the defendant \$25,000 on the twenty-eighth day of May, 1891, is not supported by the evidence. It is in proof that a promissory note for \$25,000, made by five individuals, payable to "L. J. Gage, Vice-president," was sent to the plaintiff in Chicago; and the theory of appellant is that plaintiff discounted the note, and there is certainly some evidence in support of the theory. On the other hand, it appears that Gage, the vice-president of the plaintiff bank, located in Chicago, was in San Diego; that the president of the defendant bank negotiated with him for a loan of \$25,000 to \$40,000, offering to put up, as collateral, notes, bank stock, etc.—anything, in short, that plaintiff wished; and it was finally arranged that with proper security, plaintiff would make the loan to defendant. H. F. Norcross, who was present at the negotiations, was afterward requested to write to Gage, vice-president of plaintiff, and did on or about May 21, 1891, write in reference to some note which defendant's president proposed sending "to obtain this loan, as I understood it." In this letter he gave his opinion of certain notes, and the value of defendant's stock, etc. The \$25,000 note was made by four of the directors of defendant and its cashier. In sending on the collaterals to Chicago, Collins, the president of defendant, wrote to Gage that he believed they were, "in substance, about what was spoken of at the Coronado Hotel [where the negotiations had occurred] when Mr. Norcross was with us." Upon the receipt of these collaterals, of which there seems to have been a considerable number, plaintiff

placed the \$25,000, less interest, to the credit of defendant, and paid it out on its drafts and orders. This is not all of the evidence going to show a loan of the \$25,000 by plaintiff to defendant, but is sufficient to show a substantial conflict in the evidence, and to uphold the finding of the court in favor of such loan.

Defendant at the trial objected to the testimony in reference to negotiations on the part of plaintiff and defendant for a loan of money by the former to defendant, and that the latter received the funds, upon the ground that it was immaterial, irrelevant and incompetent, and that it tended to vary and contradict the written instrument, to wit, the promissory note for \$25,000 already in evidence. We do not see that it did anything of the kind. The third cause of action was for money loaned by plaintiff to defendant. This evidence tended to support that cause of action; and the fact that defendant contended that it was not a loan by plaintiff but a purchase of the promissory note in question, did not militate against the admissibility of the evidence.

On the nineteenth day of October, 1891, the defendant, having paid the interest on the loan and \$12,500 of the principal, made its promissory note for the remaining \$12,500, payable thirty days after date, with interest, etc. This note was signed as follows: "California National Bank of San Diego, per J. W. Collins, Pres." Appellant contends that this note is not shown to have been authorized by the board of directors of the defendant, and that the president of the defendant, not having been specially empowered so to do, could not bind the defendant by making this note. Respondents meet this contention: (1) By reference to the record, which shows that at a meeting of the board of directors of defendant "held in February, 1891, a resolution was passed by the board of directors to authorize Mr. Collins, the president, to borrow \$100,000 from some eastern national bank." The record also shows that in January, 1891, J. W. Collins was elected president, and that section 19 of the by-laws of defendant requires "all contracts, checks, drafts, etc., shall be signed by the president, vice-president, or cashier." (2) Authorization implied from course of conduct of business of defendant. (3) That defendant, having received and retained the consideration for which the note was given, with notice, is estopped from deny-

ing the validity of the note. We need not notice all of these propositions in detail. Under the first of them, which authorized the president to borrow from some eastern national bank \$100,000, we think it clear that authority was conferred to borrow a less sum from plaintiff, a national bank of Chicago. Ordinarily, the power of a bank to borrow money on time implies the power to give its negotiable note on time: Morse on Banking, sec. 63. We may waive all this, however, and the case stands thus: In May, 1891, defendant borrowed from plaintiff \$25,000. Of this sum it paid \$12,500, and in October following gave its promissory note for the balance due. The complaint contains two counts for this cause of action. In the third it seeks to recover the balance due on account of the loan. In the first count plaintiff seeks a recovery on account of the note. Being for the same subject matter, it cannot recover upon both counts; but, if the note was unauthorized, it may still recover upon the count for money loaned. The very object of different causes of action upon the same transaction is to meet just such contingencies as the present; hence, the loan having been established, and plaintiff's right to a recovery therefor fixed, the question of the right of the president of the defendant to bind it by the execution of a promissory note in evidence of the indebtedness becomes of no moment in a case where, like the present, plaintiff has counted upon its claim in each form. The judgment and order appealed from should be affirmed.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

McHARRY v. STEWART.

No. 15,187; December 30, 1893.

35 Pac. 141.

Homestead—Right of Widow to Convey Homestead.—Code of Civil Procedure, section 1468, provides that, if deceased left also a minor child or children, one-half the real estate of which deceased died seised shall “belong” to his widow and the remainder to the child or children. Section 1485 provides that persons succeeding to the title of “successors to homesteads” have all the rights of the persons whose interests they acquire. Held, that a wife, having minor children by a former, deceased husband, could convey to her second husband a certain sixty acres of one hundred and seventy-five acres of land which were set apart to her and her children as a homestead out of the lands of her deceased husband.

Public Land—Homestead—Partition.—Code of Civil Procedure, Section 764, provides that when it appears, in an action of partition, that one or more of the tenants in common has conveyed in fee to another person a specific part of the common land, the land so conveyed shall be allotted in partition to such purchaser, etc., if such tract can be so allotted without material injury to the other cotenants. Held, that such purchaser’s right to file upon an “adjoining farm homestead” under Revised Statutes of the United States, sections 2289, 2290, cannot be defeated by the possibility that, on the partition, other land not adjoining that filed upon may be allotted him, instead of the specific part conveyed to him.

Public Land—Determination of Pre-emption Rights.—Revised Statutes of the United States, section 2273, provides that all questions as to the right of pre-emption, arising between different settlers, shall be determined by the register and receiver of the district within which the land is situated, and for “appeals from the decision of the district officers.” Held, that, in the absence of any statute limiting the power of the commissioner of the land office and Secretary of the Interior on appeal, the power will not be denied to the commissioner and secretary to decide questions arising on evidence, which were not decided by such district officers.

Public Land—Contest.—Where the Secretary of the Interior, in a land contest, decided on the evidence that the residence of a claimant of land as an “adjoining farm homestead,” under Revised Statutes of the United States, sections 2289, 2290, on his own land adjoining the tract claimed, was not such as to entitle him to such tract, the supreme court of California has no jurisdiction to review such question in ejectment against such claimant by one claiming the same land under the pre-emption laws of the United States.

APPEAL from Superior Court, Contra Costa County; Joseph P. Jones, Judge.

Action of ejectment by Daniel S. C. McHarry against James Stewart. From a judgment for plaintiff, defendant appeals. Affirmed.

Theo. Wagner and G. W. Bowie for appellant; Charles E. Wilson and Wm. Wells for respondent.

HAYNES, C.—The complaint is in ejectment, in the usual form, and the plaintiff's title is evidenced by a patent from the United States. Defendant answered, denying all the allegations of the complaint except that alleging defendant's possession, and filed a cross-complaint setting out facts upon which he claims that plaintiff should be adjudged a trustee of the legal title for his benefit, and be required to convey the same to him. Plaintiff's demurrer to the cross-complaint was sustained, and judgment thereon, as well as upon the issues raised by defendant's answer, which were tried by the court, was rendered against the defendant, who now appeals from the judgment; and the only question presented is as to the sufficiency of the cross-complaint.

On December 10, 1883, the defendant filed upon the demanded premises as an "adjoining farm homestead," under sections 2289 and 2290, Revised Statutes of the United States, defendant then claiming to be the owner of about sixty acres of adjoining lands, upon which he resided. On December 13th of the same year, the plaintiff, claiming a residence upon a subdivision of government lands adjoining the demanded premises, filed a pre-emption claim including the demanded premises. Upon these conflicting claims, a contest arose before the local land office, and testimony was taken. The cross-complaint sets out the facts which defendant claims were proven upon the hearing, and, by exhibits attached thereto, sets out the decision of the register and receiver thereon, the decision of the commissioner of the general land office upon appeal, the decision of the Secretary of the Interior upon appeal from the commissioner, and also the decision of the secretary upon a petition for review. The land which defendant claimed to own, and upon which he claimed to reside at the

time he filed upon the demanded premises, was formerly a part of the Pinole rancho, in which one James McClellan owned an undivided interest, which, after his marriage, was set off to him in that part of the rancho adjoining the demanded premises. McClellan died in December, 1871, leaving his widow, Getta, and two minor children, surviving him. In February, 1876, a homestead containing one hundred and seventy-five acres was set apart by the probate court, for the use of the widow and minor children, in that part of the land partitioned to McClellan which adjoined the demanded premises. Afterward, in March, 1876, the widow married the defendant, Stewart. On October 2, 1882, Mrs. Stewart conveyed to her husband (the defendant) a portion of the homestead, containing about sixty acres, adjoining the demanded premises, the children being still minors. Upon these facts, and without considering the other evidence before them, the register and receiver held that defendant acquired no right or title by his purchase from his wife, and therefore was not entitled to an "adjoining farm homestead" under the statute, and awarded the land to McHarry. On appeal to the commissioner, this decision was reversed, and the land was awarded to Stewart; and, upon appeal to the secretary, the commissioner's decision was reversed, and the land again awarded to McHarry. The evidence taken before the register and receiver principally related to two points, viz., Stewart's ownership and title to the land conveyed to him by his wife, and his residence thereon. It is conceded that, after Stewart filed upon the demanded premises, his residence was principally at Martinez, where he had gone into business. He claimed, however, that he left the land in consequence of assaults made upon him by the McHarrys and threats which put him in fear. The register and receiver did not pass upon this evidence, but rested their decision solely upon want of title to the adjoining lands, while the commissioner held his title sufficient, and that his absence from the land was excused by the acts of McHarry. The secretary held against Stewart on both points. So far as questions of fact are concerned, all courts are bound by the decision of the land department, unless such decision has been obtained by fraud or imposition. In this case we find nothing to justify a review of questions of fact: *Shanklin v. McNamara*, 87 Cal. 371, 26 Pac. 345; *Lee v. Johnson*, 116 U. S. 48, 29 L. Ed.

570, 6 Sup. Ct. Rep. 249, and cases there cited. The principal questions are, therefore: First, whether Stewart's ownership and title were sufficient to entitle him to an additional farm homestead; and, if that is answered in the affirmative, second, whether his residence on the land conveyed to him by his wife was such as the law required for the purpose of securing such additional homestead.

The land set apart by the probate court as a homestead was the separate property of the deceased, James McClellan. Such homesteads, when not community property, can only be set apart for a limited time. The estate in the lands so set apart vests, however, in those declared by the statute to be entitled to it, but subject to the assignment of such homestead by the court, and at the expiration of the time limited for its existence is subject to partition as though no homestead had been created. Section 1468, Code of Civil Procedure (act of March 24, 1874, as well as the act of 1881), provides: "If the deceased left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children if there be more than one." In *Estate of Moore*, 57 Cal. 444, it was said: "The right to have a homestead set apart is no estate, either in law or in equity." It was accordingly there held that the deed of the widow, made before the homestead was set apart, did not nor could convey away the right to a homestead; but it was not held that the deed was not operative to convey all her interest in the estate which she took by succession, such interest being subject to the power of the court to set apart a homestead. Her grantee therefore took the estate, and was the owner of it, but subject to the homestead afterward set apart by the court. If this were doubtful under the provisions of the code above referred to, section 1485, Code of Civil Procedure, makes it clear. It is there provided: "Persons succeeding by purchase or otherwise to the interests, rights and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire." The obvious intent of this section is to confirm to purchasers of the estate all the rights and interests which the grantor had or could enjoy, subject to the homestead right, and, at the

termination of the homestead, the unencumbered estate. The words "successors to homesteads" certainly imply this. Stewart therefore had title to the land, and was the owner. But it is contended by respondent—and the Secretary of the Interior seems principally to have relied thereon—that he took but an undivided interest in the homestead, and, when the land came to be partitioned, the land set off to him might not adjoin the demanded premises. Section 764, Code of Civil Procedure, provides, among other things, as follows: "Whenever it shall appear, in an action for the partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds, out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury of the rights and interests of the other cotenants who may not have joined in such conveyance." To defeat Stewart's right upon this ground, it must be assumed that partition cannot be made so as to give him the part of the land conveyed to him, or some part of it, adjoining the public lands in question, or that the bare possibility of such result is sufficient to defeat the right to an adjoining homestead. It will hardly be contended that, if Stewart's ownership and title were otherwise unquestioned, the existence of a mortgage upon it would defeat his right to an additional homestead, because his title, at some time in the future, might be taken away by foreclosure and sale; yet respondent's contention, carried to its logical conclusion, would seem to lead to that result. The contingency in question does not destroy or affect Stewart's ownership for the purposes of the homestead right, and the register and the receiver and the secretary erred in so holding.

The question of Stewart's residence is one of greater difficulty. It may be conceded that the cross-complaint shows that his residence upon the land purchased from his wife was not continuous; but facts are alleged which, if satisfactorily

proved, would excuse his absence from it. The cross-complaint, however, sets out in full, as exhibits, the decision of the commissioner of the general land office in his favor upon that question, and the decision of the Secretary of the Interior reversing that decision, thus presenting the question of the jurisdiction of the court to re-examine it. It is contended by appellant that all the questions presented by the contest before the register and receiver, upon which evidence was introduced, should have been decided by them, and that the commissioner and secretary had no power to pass upon questions of fact not passed upon by the register and receiver; that it was the duty of the commissioner, when he reversed those officers upon the only question passed upon by them, to send the case back with instructions to pass upon all the other questions. And this contention is placed by appellant upon section 2273, Revised Statutes of the United States, which provides that "all questions as to the right of pre-emption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated," and which provides for "appeals from the decision of the district officers" to the commissioner; and this right to have all the questions of fact decided by the local officers, he insists, is an important and substantial one, as the weight to be given the testimony of the different witnesses can be better estimated by them than by those who had no opportunity to observe the witnesses while giving their testimony. Prior to the act of July 4, 1836 (5 Stat. 107), there seems to have been no express power given to the commissioner of the general land office to revise the decisions of the local land officers; but where an entry was made on ex parte affidavits, which were impeached before the commissioner by another claimant, the course was to return the proofs to the local office, and direct that the parties be notified, and after proofs taken to report the proceedings to the general land office, with their opinion as to the effect of the proof: See *Barnard's Heirs v. Ashley's Heirs*, 18 How. (U. S.) 44, 15 L. Ed. 285. By section 11 of the act of September 4, 1841 (5 Stat. 456), all questions arising between different settlers were required to be "settled by the register and receiver of the district within which the land is situated, subject to an appeal to, and a revision by, the Secretary of the Treasury"; and by the act of June 12, 1858 (11 Stat., p. 326, sec. 10), the

latter clause of section 2273, Revised Statutes, was enacted. The power of the commissioner and secretary upon appeal to decide all questions arising upon the evidence taken by the register and receiver is not limited in any of the statutes relating to appeals, and the practice of so deciding all questions upon appeal is too well settled to justify us in denying them that power. That the error of law committed by the register and receiver, and affirmed by the Secretary of the Interior, had a far-reaching effect cannot be disputed. Stewart had been in possession of the demanded premises many years before the township plat was filed, and the same was fenced in with the land upon which he resided, and he filed his adjoining homestead claim thereon the day the township plat was filed. No question seems to have been made as to his place of residence at the time of his filing, nor at the time McHarry filed, which was but three days thereafter. That being true, McHarry's filing was illegal, the land being then in the rightful possession and occupation of Stewart. But if Stewart, by reason of his failure to reside on the adjacent land, was not entitled to it, the question whether McHarry was entitled was one between him and the government, in which appellant is not concerned. The question of residence being one of fact, and having been litigated before the land department, we would not have jurisdiction to examine it, even if the evidence was before us, in the absence of a clear showing that the decision was procured by fraud or imposition, and we find no such allegation of fraud or imposition in the cross-complaint as would justify the submission of the question of residence to a court of justice.

It is argued by appellant, however, that in the case of an adjoining homestead, the requirements of the law applicable to other homesteads upon the public lands do not apply. The rulings of the land department have been otherwise, and we think correctly: *Carnes v. Smith*, 10 Dec. Dept. Int. 100; *Box v. Cochran*, 3 Dec. Dept. Int. 394. Residence upon the public land filed upon is excused because that, with the land owned, is regarded as one homestead, and residence upon any part is sufficient; but residence is essential to a homestead of either kind. The judgment appealed from should be affirmed.

We concur: Searls, C.; Vancief, C.

PATERSON, J.—For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be affirmed.

HARRISON and GAROUTTE, JJ.—We concur in the judgment upon the ground that the decision of the land department that Stewart was not residing upon the premises at the time he made the homestead entry is a conclusive determination against his claim to the land. Whether the conveyance by the widow of McClellan of her interest in a portion of the premises that had been set apart as a homestead for the benefit of herself and her minor children during the existence of the homestead transferred to her grantee any title therein is a question which does not arise in this case, and is of too much importance to be unnecessarily determined: See *Gagliardo v. Dumont*, 54 Cal. 496; *Phelan v. Smith*, 100 Cal. 158. 34 Pac. 667.

KAHN v. BRILLIANT et al.

No. 15,170; December 30, 1893.

35 Pac. 309.

Instructions.—It is not Error to Refuse an Instruction which has been already substantially given.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by Henry Kahn against Abraham I. Brilliant and William H. Byington. From a judgment in favor of defendant Byington, plaintiff appeals. Affirmed.

Naphtaly, Friedenrich & Ackerman for appellant; C. L. Weller and McCreery & Byington for respondent.

BELCHER, C.—The plaintiff brought this action to recover the value of certain goods, wares and merchandise alleged to have been sold and delivered to the defendants, who were co-

partners doing business under the firm name of A. I. Brilliant & Co. The defendant Byington only appeared, and by his answer he denied that he was a partner with the other defendants. The case was tried by a jury, and the verdict and judgment were in his favor. From this judgment and an order denying his motion for a new trial the plaintiff appeals.

The only point made for a reversal is that the court erred in refusing to give to the jury a certain instruction asked by the plaintiff. In charging the jury, the court, among other things, said: "Now, there are two essential points in dispute here, and it is around these two points that your deliberations must crystallize. These points are substantially these: Was or was not Mr. Byington a partner in this firm of A. I. Brilliant & Company on or after December 17, 1889? Or, if he was not a partner, did he (Mr. Byington) permit himself to be held out or represented as a partner in such firm at any time to third persons, who gave credit to such firm on the strength or faith of such representations?" The court, then, after stating the law very fully as to general and special partnerships, and as to the liability of every general partner, read to the jury sections 2444 and 2445 of the Civil Code, which are as follows:

"Sec. 2444. Anyone permitting himself to be represented as a partner, general or special, is liable as such to third persons to whom such representation is communicated, and who on the faith thereof give credit to the partnership.

"Sec. 2445. No one is liable as a partner who is not such in fact, except as provided in the last section."

Following this, the court said: "If you should find, from the evidence, that Mr. Byington was in fact a partner (as I have explained that term to you) in the firm of A. I. Brilliant & Company on and after December 17, 1889, then I charge you your verdict must be in favor of the plaintiff for such amount as may have been proven here, which you will get later on. Again, if you find from the evidence that Mr. Byington was not in fact a partner in such firm on or after December 17, 1889, but should find that Mr. Byington permitted himself to be held out or represented as a partner in such firm at any time to third persons, and such third persons gave credit, on the faith of such representations, to such firm, then Mr. Byington would be liable to such persons, and your verdict should

then be in favor of the plaintiff; but only, of course, for such amounts of credits as may have been given to those third persons who gave credit on such representations, if any you find to have been so given." The instruction asked by plaintiff, and refused, was in these words: "When an individual permits others to hold him out as a partner, or by his acts and declarations creates in the mind of another a reasonable belief that he is a member of a partnership, he is liable to the person so believing, on a bona fide contract made by the latter with a member of such firm in the regular course of business, although in fact no such partnership existed." It is admitted that the instruction was refused upon the ground that it had already been given in substance and effect, and we think the refusal was justified. The charge as given stated the law upon the subject referred to in the refused instruction fully and fairly; and as has been many times held by this court, a trial court is not bound to repeat itself at the request of counsel. After it has already given an instruction which substantially covers a question involved in the case, all other instructions on the same subject may well be refused. The authorities to this effect are numerous, and need not be cited. The judgment and order should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

SCHMIDT et al. v. WELCH et al.

No. 15,136; December 30, 1893.

35 Pac. 626.

Trademark—Infringement.—Where Labels Used on Bottles containing medicine manufactured by defendants in no respect resemble labels used by plaintiffs on bottles containing similar medicine put up by them, except that both labels have thereon the words "Sarsaparilla and Iron," plaintiffs are not entitled to an injunction or to damages.

APPEAL from Superior Court, City and County of San Francisco; F. W. Lawlor, Judge.

Action by Schmidt and others against Welch and others to recover damages for infringement of a trademark and for an injunction. From a judgment for plaintiffs and from an order denying a motion for a new trial, defendants appeal. Reversed.

James G. Maguire, E. S. Solomon and Henry Eickhoff for appellants; John L. Boone and Langhorne & Miller for respondents.

PATERSON, J.—The facts found by the court below in this case are in all respects the same as those found by the court in *Schmidt v. Brieg* (this day filed), 100 Cal. 672, 22 L. R. A. 790, 35 Pac. 623, except as to the amount of damages. A decree like the decree in the *Brieg* case was entered, the damages, however, being fixed in this case at \$3,163.70. In the *Brieg* case we held that the plaintiffs were not entitled to the exclusive use of the words “Sarsaparilla and Iron” as a trademark, but that they were entitled to a decree restraining the defendants from selling or offering to sell any beverage under the label, exhibit “B,” attached to the complaint therein, and to an affirmance of the judgment for damages and costs. Our decision in that case is based upon the finding of the court that the defendants, with intent to divert to themselves the business of the plaintiffs and the profits and gains thereof, and to deceive the public, had fraudulently prepared and sold an inferior article in imitation of the plaintiffs’ beverage, and, with intent to deceive and defraud the public and injure and defraud the plaintiffs, had caused said inferior article to be put up in bottles and packages similar to those used by the plaintiffs for their article, and sold under labels, marks, and devices similar to the names, labels, marks, and devices used by the plaintiffs. The fraudulent acts complained of and found consisted in the unlawful and studied imitation of the plaintiffs’ label under which the latter’s beverage had been sold and become widely known as a valuable and useful beverage, and a source of great profit to them. In the case at bar, however, the defendants’ label is in no respect similar to that used by the plaintiffs. With

the exception of the words "Sarsaparilla and Iron" there is nothing in defendants' label in form, design, or lettering similar to the plaintiffs' label. The larger label is diamond-shaped, with a flowery border, instead of the strong parallel lines found in the plaintiffs' border. There is no attempt to imitate the trademark in the upper portion of the plaintiffs' label nor the peculiar and uneven letters in the crescent-shaped label. The name of the manufacturer, "Pioneer Soda Works, S. F.," appears in large letters across the widest portion of the label. Unless we are prepared to hold, therefore, that the defendants are not entitled to put any paper labels upon their bottles, the finding of the court as to the effect of the defendants' label cannot be sustained. Inasmuch as the plaintiffs have no exclusive right to the use of the words "Sarsaparilla and Iron," we think it cannot be said that the use of the defendants' label is an infringement of the plaintiffs' label or in any manner fraudulent. Judgment and order reversed.

We concur: McFarland, J.; Garoutte, J.; Harrison, J.; Fitzgerald, J.

MIETZSCH v. BERKHOUT.

No. 15,011; December 30, 1893.

35 Pac. 321.

Municipal Corporations — Widening Streets—Assessments. —

Statutes of 1889, page 70, sections 10-15, regulating the procedure for widening streets, provide that the commissioners must file with the clerk of the board of supervisors a report specifying each lot, etc., assessed for the improvement, with the name of the owner and a plat of the assessment district; that the clerk must give notice requiring persons interested to show cause, at a time named, why such report should not be confirmed, etc. Held, that a lot owner who failed to object to an assessment, and to proceed as provided by such statute, could not maintain an action to declare the assessment void, and enjoin the execution of a deed pursuant to a sale of the assessed property to pay the assessment.

Municipal Corporations—Street Improvements—Assessments.—

Where a city lot is assessed only \$2.50 for a street improvement, and sold for nonpayment, and the owner could redeem from the sale

by paying \$3.90, the maxim, "De minimis non curat lex," applies, and a court of equity will not restrain the execution of a deed pursuant to such sale, if invalid.¹

APPEAL from Superior Court, City and County of San Francisco; Eugene R. Garber, Judge.

Action by E. Mietzsch against Amelia Berkhout and James Gilleran, as superintendent of public streets of the city of San Francisco, for an injunction. From a judgment for defendants, plaintiff appeals. Affirmed.

Henry E. Highton for appellant; A. W. Linforth for respondents.

BELCHER, C.—Proceedings were regularly instituted for the widening of Mission street, in the city and county of San Francisco, and for the condemnation for that purpose of a strip of land sixteen and one-half feet wide, along the southeasterly side of said street. The proceedings resulted in a judgment of condemnation and in assessments upon certain lots of land owned by the plaintiff, to help pay the expenses of the improvement. The assessments not being paid, the said lots were sold thereunder to one William Kreling, who received certificates of purchase therefor, and assigned the same to the defendant Amelia Berkhout. There was no redemption of any of the property so sold, and at the proper time the said assignee served on the plaintiff the usual and required notice, that she would apply for deeds of the lots pursuant to the said sales. The defendant James Gilleran, the then superintendent of streets in and for the said city and county, was about to execute and deliver the deeds so applied for, and thereupon the plaintiff commenced this action to obtain a decree restraining the execution and delivery thereof. A summons was duly issued and served on each of the defendants, but they failed to appear, and their defaults were entered. Thereafter, the case was submitted to the court below for decision, and after consideration the court made and filed its

¹ Cited and approved in *Ciapusci v. Clark*, 12 Cal. App. 53, 106 Pac. 440, where a contract for timber, full payment having been made, to be removed within ten years, was not allowed to be forfeited because an annual five dollars, mentioned therein as "rent," had not been promptly paid.

findings of facts and conclusions of law, to the effect that all the allegations of the complaint were true, but that the plaintiff was not entitled to the relief demanded, and that judgment should be entered in favor of defendants. Judgment was accordingly so entered, from which the plaintiff appeals.

In the proceedings for condemnation above referred to, the appellant here was a party defendant; and from the judgment entered in the case and an order denying a new trial an appeal was taken by the defendants to this court, where the judgment and order were affirmed: *City and County of San Francisco v. Kiernan*, 98 Cal. 614, 33 Pac. 720. Most of the questions involved in this case were involved in that, and were decided against the contention of appellant. They must therefore, upon this appeal, be treated as settled, and need not be further considered.

It is claimed, however, that one of appellant's lots was assessed for a larger portion of the costs, damages and expenses resulting from the proceedings to effect the widening than it should have been, and hence that the entire proceedings, as to him, were invalidated. The order of the board of supervisors, under which the proceedings were initiated and carried on defined the district to be benefited by the widening, and upon which the costs, damages and expenses thereof should be assessed, as the land extending along each side of Mission street as widened, from Twenty-sixth street to the San Mateo county line, and having a uniform width of one thousand feet on each side of the street; and it declared that after deducting from the total costs, damages, and expenses of the widening the amount assessed to the railroad company occupying the street, the remainder should be assessed as follows: One-fourth upon the lands and improvements thereon lying within a uniform distance of one hundred feet easterly from the southeasterly line of the street, as widened; one-fourth upon the lands and improvements lying between one hundred feet and one thousand feet easterly from the southeasterly line of the street; and the other two-fourths upon the lands and improvements similarly described on the northwesterly side of the street: "provided, that all lots or parcels of land within one hundred feet of the southeasterly or northwesterly lines of Mission street, . . . not fronting directly on the line of said street, shall, for the purposes of this assess-

ment, be assessed as though the same were outside the line of said one hundred feet, as hereinbefore provided, and be assessed as herein provided for the assessment of land and property distant more than one hundred feet from the southeasterly and northwesterly lines of said street." The appellant owned six lots subject to assessment under the said order. Three of these lots the complaint describes as lots 51, 52 and 53, "as designated upon a certain map of the Bernal Homestead Association," on file in the office of the recorder of the city and county, and as "forming a complex of lots or parcels of land designated as, and subdivided into, lots 2, 4, and 5 of block 166 in the report, and on the map, plans, and diagrams of the Mission street widening commissioners." The complaint further describes lots 51 and 52 as commencing at the corner of Mission street and Allison avenue, and extending thence along Mission street one hundred and four feet four inches, and along Allison avenue forty-two feet nine inches, with a width or length at the other end or side of ninety-six feet two inches; and it describes lot 53 as located in the rear of the other two lots, and fronting on Allison avenue, with a uniform width of fifty feet and a length of one hundred and twenty feet. It is alleged that the larger part of lot 53 was within the one hundred feet limits, as above defined, and was assessed as within those limits, when the whole lot should have been assessed as within the nine hundred feet limits; and it is claimed that the assessment so made "presented an incontestable violation of the order under which it was sought to levy the assessment." The statute regulating the mode of procedure provided, in substance, that the commissioners appointed for the purpose must make and file with the clerk of the board of supervisors their report, specifying each lot, subdivision or piece of property assessed, with the name of the owner thereof, if known, and a plat of the assessment district, showing each block and lot, or portion of lot, assessed, and its dimensions, designated and described by an appropriate number; that upon the filing of the report and plat the clerk must give notice thereof by publication for at least ten days, requiring all persons interested to show cause before the board on or before a day named, why such report should not be confirmed; that all objections must be in writing, and filed with the clerk, and by him laid before the board; that the board must fix a

day for hearing the objections, and the clerk must notify the objectors thereof; that at the time fixed the board must "proceed to pass upon the report, and may confirm, correct or modify the same, or may order the commissioners to make a new assessment, report and plat"; that the clerk must forward to the street superintendent a certified copy of the report, assessment and plat, as finally confirmed and adopted, and that such certified copy shall thereupon be the assessment-roll; and that, immediately upon receipt thereof by the street superintendent, the assessment therein contained shall become due and payable, and shall be a lien upon all the property contained and described therein: Stats. 1889, p. 70, secs. 10-15. It appears from the complaint that the above-mentioned provisions of the statute were complied with; that written objections were filed by a number of persons interested, and were considered and acted upon by the board; and that, after modifying the report in a few details, the board "undertook and attempted to confirm and adopt, and in form confirmed and adopted, the said report, assessment, and plat." It does not, however, appear that any objection was made by appellant as to the assessment upon any of his lots. He apparently thought he could safely rest upon his oars till after the sale, and then invoke the power of a court of equity to declare the sale null and void. But we do not think he was at liberty to do that. If the objection now urged had any merit, it should have been presented to and acted upon by the board; and it cannot, in our opinion, be raised for the first time in the courts: See *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71. Besides, no diagram or definite description of lot 5, as assessed, is presented, and from the general description we infer that it is the same as lot 53. But it appears from the complaint that lot 5 was sold for \$2.50, the full amount of the assessment against it, and could have been redeemed by paying \$3.90. This being so, the maxim, "*De minimis non curat lex*," may well be held applicable to the case.

The other points do not require special notice. The judgment, in our opinion, should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

PEOPLE v. SANDS.*

No. 15,369; January 3, 1894.

35 Pac. 330.

Justice of Peace—Vacancies in Office.—City justices of the peace are not township or county officers, and the board of supervisors has no authority to fill vacancies therein.

Justice of Peace—Vacancies in Office.—Although inferior courts in incorporated cities can be established only by the constitution (article 6, section 1), and their jurisdiction, powers, and duties must be fixed by the legislature (constitution, article 6, section 13), still a valid provision for filling vacancies may be made by charter.

Justice of Peace—Vacancies in Office.—Under a charter providing that the mayor shall appoint suitable persons to fill vacancies in office, he is empowered to fill vacancies in the offices of city justices of the peace.

APPEAL from Superior Court, Alameda County; F. W. Henshaw, Judge.

Action in the nature of quo warranto by the people, on the relation of Fred V. Wood, against John A. Sands. From a judgment for plaintiff, defendant appeals. Reversed.

Davis & Hill for appellant; W. H. H. Hart, attorney general, Jas. C. Martin and A. A. Moore for the people.

HAYNES, C.—This is an action in the nature of quo warranto, brought by the people on relation of Fred V. Wood against John A. Sands to try the title of the relator and the defendant, respectively, to the office of city justice of the peace of the city of Oakland. The office became vacant by the resignation of the prior incumbent, and the mayor of the city, acting under the "freeholders' charter," appointed the defendant to fill the vacancy. Sands thereupon qualified and entered upon the duties of said office. The board of supervisors of Alameda county, assuming that the power of appointment to said office was vested in them, appointed the relator to fill the same vacancy, and he also qualified and demanded possession of the office. The cause was submitted in the court

*For subsequent opinion in bank, see 102 Cal. 12, 36 Pac. 404.

below upon an agreed statement of facts, which was adopted as a finding, in which it is conceded that each of these persons possesses all the qualifications required by law, and that the sole question is as to where the power of appointment to fill said vacancy is vested. The superior court held that said power was vested in the board of supervisors, and gave judgment in favor of the relator, Wood, and defendant Sands appeals therefrom.

Appellant contends that a city justice of the peace is a city officer, and that under the charter of the city the mayor is empowered to fill all vacancies in city offices. If a city justice of the peace is a city officer, the provision of the charter is insufficient in its terms to authorize an appointment by the mayor to fill the vacancy. Its language is as follows: "The mayor shall have the power to appoint suitable persons to fill vacancies in any office, except as in this charter provided": Stats. 1889, p. 570, sec. 202. The exception does not affect this case. The contention of respondent, briefly stated, is that city justices are not city officers, but are officers designated by the constitution, and exercising a part of the judicial power therein provided for; that, even if the power of appointment to a vacancy is not enumerated in the general permanent powers of the board of supervisors, a general provision gives them such other power, and charges them with such other duties, as are or may be imposed upon them by law; and among these is the power and duty imposed by section 111 of the Code of Civil Procedure, which reads as follows: "If a vacancy occurs in the office of a justice of the peace, the board of supervisors of the county shall appoint an eligible person to hold the office for the remainder of the unexpired term." These provisions, however, cannot be held to give the board of supervisors the power to fill the vacancy in question, if the office of city justice is a city office. Section 103 of the Code of Civil Procedure, as amended by the act of March 31, 1891 (Stats. 1891, p. 456), provides that there shall be at least one justice of the peace in each township, elected by the qualified electors of the township, and gives the board of supervisors authority, when, in their opinion, the public convenience requires it, to establish two justices' courts in townships; and further provides: "In every city having fifteen thousand and not more than thirty-four thousand inhabitants there shall be

one justice of the peace, and in every city having thirty-four thousand and not more than one hundred thousand inhabitants, two justices of the peace, to be elected in like manner by the electors of such cities respectively, and such justices of the peace of cities, and justices' courts of cities, shall have the same jurisdiction, civil and criminal, as justices of the peace of townships and township justices' courts. No person shall be eligible to the office of justice of the peace in any city having over fifteen thousand inhabitants who has not been admitted to practice law in a court of record. . . . Every justice of the peace in any city having over fifteen thousand inhabitants shall receive an annual salary of two thousand dollars per annum, and shall be provided by the city authorities with a suitable office in which to hold court. All fees which are by law chargeable for services rendered by such justices of the peace in the cities aforesaid, shall be by them, respectively, collected, and on the first Monday in each month every such city justice of the peace shall make report, under oath of the city treasurer, of the amount of fees so by him collected, and pay the amount so reported into the city treasury, to the credit of the general fund thereof." Here it will be seen that not only are different designations given to justices in cities and townships, but that different qualifications are required; that, as to township justices, the board of supervisors have the power to increase the number from one to two, but are charged with no duty, discretion, or power in regard to city justices; that the number and the salary of city justices are definitely fixed by the legislature; that the city must provide suitable places for holding their courts; that the city justices must report to the treasurer of the city, and pay over all fees collected; and by another statute the salary of the justice must be paid by the city. The same distinctive appellation is given in numerous other statutes; as in the municipal government act, sections 390, 397, 402 (Pol. Code, pp. 794, 795); and also by the act of March 18, 1885 (Stats. 1885, p. 213).

In the county government act, approved on the same day as the above amendment of section 103, Code of Civil Procedure, it is declared that "the officers of a township are two justices of the peace, two constables, and such inferior and subordinate officers as may be provided by law or by the board of supervisors; provided that in townships containing cities

in which city justices are elected, there shall be but one justice of the peace": Stats. 1891, p. 314, sec. 58. It is obvious that the local character of justices of the peace is not denied by any provision of the constitution, while all the statutes relating to their election and jurisdiction characterize them as local officers; and if justices of the peace elected by electors of a township, and exercising their jurisdiction therein, make them township officers, as declared by the foregoing statute, it is difficult to perceive why a justice elected by the electors of a city, and exercising his jurisdiction therein, is not a city officer. The constitution and statutes clearly distinguish between county organizations and governments and city organizations and governments. Each have distinct legislative bodies and executive officers. Nowhere is any duty or authority vested in the board of supervisors over municipal matters or officers, except in the case of consolidated city and county governments.

By still another act, approved March 31, 1891 (Stats. 1891, p. 292), are city justices recognized as city officers. It is there provided that "the judicial power of every city having thirty thousand and under one hundred thousand inhabitants shall be vested in a police court, to be held therein by the city justices, or one of them, to be designated by the mayor, . . . and it is hereby made the duty of said city justices, in addition to the duties now required of them by law, to hold said police courts." The police court is given by said act exclusive jurisdiction of certain violations of the criminal laws of the state committed within the city, and is also given other powers concerning the violation of the criminal laws of the state, while sitting as a police court; and in a certain class of cities, of which Oakland is one, a clerk is given said court, whose salary is paid by the city, and of whom a bond, to be approved by the mayor, is required; and the city justices, as well as the clerk, are required to report and account to the city; and by section 305 of the municipal corporations act (Deer. Pol. Code, p. 786) vacancies in city offices are filled by the council upon nomination made by the mayor.

The charter of the city of Oakland provides for a police court, to be held by a police judge to be elected by the city, and also provides for the election of two city justices of the peace, but provides that the justices' courts therein provided

for are intended to be the justices' courts provided for by general law, and that there shall be only two justices of the peace in said city. In *Ex parte Ah You*, 82 Cal. 339, 22 Pac. 929, it was held that the police court provided for by the freeholders' charter of the city of Oakland has no legal existence; and in *People v. Toal*, 85 Cal. 333, 24 Pac. 603, the same conclusion was reached touching a similar provision in the charter of the city of Los Angeles. In each of these cases there was a dissenting opinion, but they have not been overruled, and are therefore authoritative. It follows, therefore, that the act of March 31, 1891 (Stats. 1891, p. 292), is in force in the city of Oakland. But it does not follow that, because inferior courts in incorporated cities and towns can only be established by the legislature, under section 1 of article 6 of the constitution, and that their jurisdiction, powers, duties, and responsibilities must also be fixed by the legislature under section 13 of the same article, a valid provision for filling vacancies in city offices may not be made in the charter. Such provision in no way trenches upon the constitutional provisions above cited relating to establishing inferior courts and fixing their jurisdiction; nor can it affect the question that city justices are provided for in the general municipal government act and in the Code of Civil Procedure. They are local officers, elected by the electors of the city, with qualifications different from that of township justices, and adapted to the wants of the city and the requirements of its business, with a special jurisdiction added that is purely municipal. If the naming of officers and prescribing their duties by the legislature can make them other than municipal officers, then the mayor and other officers, who are named in the municipal government act, and whose powers and duties are therein prescribed, are not municipal officers. But it is clear that city justices are not township or county officers, and, if so, it is equally clear that the board of supervisors has no authority to fill the vacancy in question. I advise that the judgment appealed from be reversed, with directions to the court below to enter judgment upon the findings in favor of appellant, and that he be restored to his said office.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment appealed from is reversed and the court below is directed to enter judgment upon the findings in favor of appellant and that he be restored to his said office.

FERGUSON v. McBEAN.

No. 19,232; January 22, 1894.

35 Pac. 559.

Pleading—Allegation of Nonpayment.—A complaint alleging that plaintiff demanded payment of a specified sum, that defendant refused payment, and that the sum is due and unpaid, sufficiently alleges nonpayment of the sum alleged to be due.

Appeal.—Where the Evidence is Conflicting, the Verdict should not be disturbed.

Assignment of Contract to Purchase Land—Evidence.—Plaintiff, having made a contract to purchase land from C., assigned it to defendant, who agreed to pay plaintiff a certain sum if he purchased the land from C. Held, in an action to recover such sum, that it was competent to show the circumstances attending the making of the contract of assignment, it being disputed whether C.'s sale of the land to defendant's stepson was under the contract between C. and plaintiff, and the relations between defendant and his stepson in regard to the entire transaction being a material issue raised by the pleadings.

Assignment of Contract to Purchase Land—Evidence.—It was proper to deny defendant's motion to strike out plaintiff's evidence as to conversations with a third person, not in the presence of defendant, and to retain such evidence till plaintiff's evidence was in, as other evidence might show that such third person was authorized to represent defendant.

Assignment of Contract to Purchase Land.—Evidence that a third person agreed to pay plaintiff a part of the sum sued for was properly excluded, since defendant could not be relieved from his written obligation by such person's agreement to pay it, unless plaintiff released him.

Assignment of Contract to Purchase Land.—Evidence that defendant's stepson told another person that he was representing defendant, and was ready to consummate the trade, was competent to show that the purchase was made under the contract assigned to defendant.

Assignment of Contract to Purchase Land.—It was Also Competent to corroborate defendant's statement, after the sale, that he had purchased the property.

Assignment of Contract to Purchase Land.—The Possession and production by defendant's stepson, at the time of the transaction, of the assignment of the contract by plaintiff to defendant, were competent to show that he was defendant's agent.

Assignment of Contract to Purchase Land.—The Admission of testimony that plaintiff said defendant was represented by his stepson at the sale was not cause for reversal, when plaintiff had already testified to the circumstances connected with the assignment of the contract, and that the stepson was a party to the assignment, though it was not so stated therein.

Assignment of Contract to Purchase Land.—Plaintiff Having Made the contract with C. personally, and having assigned it to defendant, evidence that plaintiff made the contract with C. at the request of one R. was properly excluded, as such fact would not alter defendant's liability.

APPEAL from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by M. L. Ferguson against Alexander McBean on contract for the sale of lands. There was judgment for plaintiff, and defendant appeals. Affirmed.

Hendrick & Younkin and E. Crossman for appellant; Rowell & Rowell and Hunsaker, Britt & Goodrich for respondent.

HAYNES, C.—This action was originally brought against McBean and A. V. Bills. The defendants demurred to the original complaint upon the ground that Bills was improperly joined as a defendant. The demurrer was overruled, and, upon the trial, plaintiff had judgment. Upon appeal by defendants it was held that the demurrer should have been sustained, and the judgment was reversed, with leave to the plaintiff to amend her complaint: See 91 Cal. 64, 14 L. R. A. 65, 27 Pac. 518. Respondent thereupon dismissed the action as to Bills, and amended her complaint in the matters made necessary by the dismissal of the action as to Bills, but retained, in substance, all of the allegations contained in the original complaint connecting Bills with the transaction. For a statement of facts of the case, see opinion of Mr. Chief

Justice Beatty upon the former appeal: 91 Cal. 66, 14 L. R. A. 65, 27 Pac. 518.

The only questions presented upon this appeal which were not disposed of by the former appeal arise upon a demurrer to the amended complaint, and upon certain specifications of insufficiency of the evidence to justify the findings of fact, and upon exceptions to the admission and exclusion of evidence. The demurrer to the amended complaint was properly overruled. The allegations that plaintiff demanded payment of a specific sum, that defendant refused to pay said sum, "and that the same is now due and unpaid," sufficiently allege the nonpayment of the sum alleged to be due from the defendant to the plaintiff. As to the sufficiency of the evidence to justify the findings of fact in the several particulars specified by appellant, it is sufficient to say that upon each of these findings the evidence was materially conflicting, and, under the numerous decisions of this court, cannot be disturbed.

The respondent, called as a witness in her own behalf, was asked by her counsel the following question: "State the circumstances attending the making of the contract between you and McBean, set out in the complaint, wherein you assigned to McBean your interest in the contract theretofore made by you with the Colton Land and Water Co." It was objected by appellant that the question was irrelevant and immaterial, and not in issue in the case; that the contract was in writing, was set out in the complaint, and its execution admitted by the answer; and that evidence was inadmissible under those circumstances to prove either its contents or the circumstances under which it was executed, or that any other persons were parties to the same; and that the contract is not ambiguous. The objection was properly overruled. There were other questions in issue beside the terms and execution of the contract signed by McBean, and as to which the circumstances attending the making of the contract of assignment to McBean were both relevant and material. One of these questions was whether the sale and conveyance of the property by the Colton Land and Water Company to Bills was under the contract between the Colton Land and Water Company and respondent. If the circumstances called for by the question tended to elucidate the matter above suggested, it was material and competent. So, too, the relation between McBean and Bills in

reference to the entire transaction, and each part of it, was a material matter put in issue by the pleadings, and, the issue being material, any competent evidence tending to sustain the issue on the part of the plaintiff was proper. The motion to strike out all the answer to the foregoing question, "except such portions as pertain to the identification of the contract," was also properly denied. It is not essential to the admissibility of evidence that it should prove the issue under which it is offered. It is only necessary that it should tend to prove the issue or some part of it. We think the answer clearly tended to sustain a material issue, and was therefore properly retained.

Respondent was asked certain questions in chief as to conversations with Bills not in the presence of McBean, to which objections were made. The court overruled these objections, saying that "any conversation with Bills does not bind McBean unless he is connected with it. It is only a question of the order of proof, and it may as well come in one time as another." Defendant afterward moved to strike out all the testimony of this witness relating to the conversations that she had with Bills, on the ground that no authority from McBean had been shown authorizing Bills to act as his agent in any manner, and that her testimony, so far as it relates to Bills, is wholly irrelevant and immaterial, which motion was denied, and defendant excepted. The motion to strike out was premature, and was properly denied. The court did not abuse its discretion in permitting the evidence to be given at that stage of the case. It involved only the power of the court to control the order of proof; and, even conceding that the testimony of this witness did not then tend to show that Bills was authorized to represent McBean, if it did not show that it was not so authorized, it was proper to retain it until all of plaintiff's evidence was in, as other evidence might, and as we think did, show that he was so authorized.

Upon cross-examination the plaintiff was asked: "Whose \$1,000 was that that was paid for the first payment?" An objection on the part of the plaintiff was sustained, to which the defendant excepted. This point was settled upon the first appeal: See 91 Cal. 73, 14 L. R. A. 65, 27 Pac. 518. Besides, if the court erred in sustaining this objection, it was rendered

harmless by subsequent evidence that this \$1,000 was furnished to her by Raynor.

Plaintiff was asked, upon cross-examination, the following question: "Did Raynor agree to pay you some portion of the \$3,000, or the whole of it?" Plaintiff's objection was properly sustained. The defendant had entered into a written obligation to pay the money demanded, and could not be relieved from that obligation by Raynor's agreement to pay it, unless, in consideration of that agreement, the plaintiff released McBean; and this was not included in the question nor proposed to be shown.

The testimony of Mr. Mintzer that the property was sold to Bills under the contract made with plaintiff was both material and relevant. The conversation between Bills and Mintzer, testified to by the latter, in which Bills said he was there representing McBean, and was ready to consummate the trade, was competent and material for the purpose of showing that the purchase was made under the contract assigned to McBean by the plaintiff. The absence of McBean did not affect the testimony upon that point, at least. As to its bearing on the question of Bills' agency for McBean, it corroborated the statement of McBean, made to the witness after the sale, "that he had become the purchaser of the property; that he meant to put in larger pipes." So, too, the possession and production by Bills, at the time of the transaction, of the assignment of the contract by plaintiff to McBean, was a circumstance which tended to prove that he was the agent of McBean, and corroborated his statement that he represented McBean.

The subsequent conversation between Mintzer and McBean in regard to the sale of lots made by Mintzer after the contract with plaintiff, and before the conveyance to Bills, was also relevant and material. As urged by counsel, there was no issue in the case as to who was entitled to these lots, or the proceeds of them; but the fact that McBean raised a question in regard to them, and claimed the unpaid portion of the money for which they were sold, was very cogent and convincing evidence of three important facts in controversy, namely: (1) That the purchase, by whomsoever made, was made under this contract, as otherwise no possible claim could be made for lots sold after the date of the contract, and before the sale on July 13th; (2) that McBean was the real pur-

chaser at that sale; and, if so, (3) that Bills was in fact his agent in the transaction. His interest in these lots could only have been acquired under the contract and by the sale made by the Colton Land and Water Company ostensibly to Bills. It does not affect the force of this evidence that Raynor had an interest in the purchase, and that Bills also represented him, for, so far as the Colton Land and Water Company and the plaintiff were concerned, he could serve Raynor only as the agent of McBean, who held the sole title to the contract. The objection to the testimony of the witness Mintzer that Mrs. Ferguson told him that Bills was there to represent McBean does not appear to have been sufficiently presented to the court below; but, assuming it to have been properly taken, the answer of the witness does not justify a reversal of the judgment. The plaintiff had already testified to the circumstances connected with the assignment of the contract to McBean, and that Bills was in fact a party to the assignment, though not so expressed in it. She had given evidence, as had also the witness upon the stand, tending to show the agency of Bills. Besides, if it were conceded that the court erred in overruling defendant's objection to this testimony, it is clear that the error was harmless, as the testimony abundantly shows, as we have just seen, that Bills was in fact the agent of McBean. The fact of the agency being sufficiently established by other testimony, and especially by the conduct and declarations of the defendant himself, he could not be injured by testimony erroneously admitted upon the same fact.

P. A. Raynor, called on behalf of the defendant, was asked the following question: "State at whose instance she obtained that contract." This question was asked for the purpose of showing that the contract here sued upon was obtained by Mrs. Ferguson from the Colton Land and Water Company at the instance and request of Raynor. This evidence was clearly immaterial. The plaintiff made the contract with the Colton Land and Water Company personally, and it was assigned to the defendant, who agreed in writing that, under the circumstances and conditions therein expressed, he would pay to her the sum of \$3,000. The obligation of the defendant, it is clear, could not be affected by the fact that Raynor, or anyone else, had instigated the plaintiff to procure the contract.

W. E. Raynor, a witness for defendant, having testified that the mortgage given by his father to Bills for \$35,000 included the unpaid purchase money of McBean's water right, as well as of the remainder of the land, was asked by defendant the following question: "State what was the relative consideration for the giving of that mortgage, as between McBean's water contract and Bills' interest in the land." Plaintiff's objection thereto was properly sustained. It will be observed that the mortgage was made to Bills alone. The question concedes that it included the unpaid consideration of the water right, which belonged to McBean, and assumes that the land conveyed by Bills to Raynor was in fact owned by Bills, and that McBean had no interest in it. The question at issue was as to McBean's interest in the land purchased from the Colton Land and Water Company under the Ferguson contract. How the relative value of the land and the water could possibly tend to show who in fact owned the land is beyond comprehension. If the witness had answered that the purchase price of the water included in the mortgage was one-fourth, it would have tended neither more nor less to prove the ownership of the land than would the answer that it was three-fourths. The question as to the relative value of these interests was therefore wholly immaterial. Finding no material error in the record, the judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion, said judgment and order are affirmed.

DAVIS v. EAMES et al.

No. 19,284; January 25, 1894.

35 Pac. 566.

Mines.—A Contract Giving an Option to Purchase a mine, wherein the vendors covenant to sink a shaft of at least one hundred feet, imposes on them the absolute duty of sinking the shaft to the agreed depth, though they find no evidence that the mine contains enough valuable ore to justify them in purchasing it. *Woodworth v. McLean*, 97 Mo. 325, 11 S. W. 43, distinguished.¹

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by A. E. Davis against A. W. Eames and others for breach of contract. From a judgment for plaintiff, defendants appeal. Affirmed.

Wilson & Lamme for appellants; Houghton, Silent & Campbell for respondent.

BELCHER, C.—This is an action to recover damages for an alleged breach of contract by the appellants. The case was tried by the court without a jury, and judgment was entered against appellants for the sum of \$700 and costs, from which, and from an order denying their motion for a new trial, they appeal. The facts are substantially as follows: The respondent, being the owner of a certain mining claim, known as the "Todd Mine," entered into a written contract with the appellants, by which, in consideration of the covenants and agreements to be performed on their part, he agreed to convey to them the property within four months for the sum of \$6,000;

¹ Cited and approved in *Moore v. Pooley*, 17 Idaho, 61, 104 Pac. 900, a case where one applying for an option to purchase had notice of claimants to the title, other than the apparent owner, but contented himself with assurances from the latter and so contracted in writing with him for the option. He subsequently sought to evade this contract, setting up that the vendor was not the owner and alleging fraud. In an action against him to enforce the contract it was said: "The liability, it will be observed, was made absolute by the contract, whether the defendant elected to buy the property or refused to purchase."

and they covenanted and agreed to at once enter upon the mine, and sink a shaft thereon to the depth of at least one hundred feet, and to crosscut the ledge on the fifty-foot level, and at the bottom of the shaft to crosscut again at least ten feet, and to make such other developments thereon as they might deem proper. They were also to have all the ore taken from the mine in doing this work. In pursuance of the terms of the contract, appellants entered upon the mine and sunk a shaft to a depth of fifty-six feet. At the fifty-foot level they ran a crosscut a distance of forty-seven feet and struck a granite wall, which they penetrated about three feet. They then, without the plaintiff's consent, discontinued work in the shaft and never afterward did any more work in it or sunk any other shaft in the mine. There were croppings on the surface of the mine and seams leading out from the croppings containing paying ore. The shaft was started on one of these seams, and from it defendants took some three or four tons of ore, which yielded about \$20 per ton; but it gave out at a depth of about twenty-six feet, and below that point they found no ore in the shaft or crosscut. They afterward prospected on the surface, and spent some \$1,200 in so doing, but did not, as they thought, find evidence that the ledge contained valuable ore in sufficient quantities to justify them in paying for the mine, and thereupon they abandoned the contract. It is admitted that it would have cost at least \$700 to sink the shaft the remaining forty-four feet and make the ten-foot crosscut at the bottom; and, as a reason for not completing the contract in this regard, the witness James, who was an experienced miner in charge of the work, and interested with defendants therein, testified: "One of the reasons why we felt that we could not comply with the written contract and why we wanted it modified was because it would require steam works to sink the shaft deeper, which would have cost a good deal."

Counsel for appellants say in their brief "that the only question to be considered is whether, under the facts and circumstances disclosed by the record, the respondent is entitled to anything in excess of nominal damages"; and they insist that he was not in fact damaged in any sum or to any extent by the failure to sink the shaft to the depth agreed upon, and hence that the court erred in awarding damages

in the sum of \$700. In support of this position, counsel cite and rely upon the case of *Woodworth v. McLean*, 97 Mo. 325, 11 S. W. 43, 17 Morr. Min. Rep. 194. That was an action to recover damages for breach of a written contract. Plaintiffs owned a mining claim in New Mexico, and conveyed to McLean two-thirds of it as a consideration for the contract in question. The contract provided that McLean, within two years, and at his own expense, should cause a shaft of certain dimensions to be sunk to "the depth of five hundred feet on the vein of ore cropping out on said claim." McLean sunk the shaft, as agreed, to a depth of three hundred and thirty feet, but refused to carry it farther. There was evidence for defendant to the effect that the work was stopped at that point because the vein of mineral had given out entirely. The plaintiffs were awarded nominal damages only, and appealed. The appellate court said: "Plaintiffs regard this contract as obliging McLean to sink the shaft five hundred feet, in any event, irrespective of all intermediate developments. Their entire argument here rests on that assumption. We think the language of the agreement does not reasonably bear that interpretation. Its intent and purpose were to secure a development of the claim in a manner to 'subserve the mutual interests of the parties,' and, on the completion of the work, two-thirds of the shaft (as part of the entire claim) was to belong to McLean. The latter stipulated to sink the shaft five hundred feet 'on the vein of ore cropping out on said claim.' If, in the progress of the work, all indications of valuable mineral ceased, and the vein of ore ran out entirely, there was no obligation on McLean to proceed further. The question whether the vein of ore had ceased is one of fact, to be tried in the usual way. As the work stopped within the five hundred feet, the burden of proof rested on him to show that the vein of ore (along which the shaft was to proceed) had terminated, for the contract itself asserts the existence of the vein at the beginning. But on establishing that fact the requirements of the contract would be met, and there would be no breach whatever. The measure of damages for failing to continue a mining excavation, such as this, to the point fixed by the contract, is the reasonable price or value of the work necessary to complete the shaft to the agreed depth. But this rule is not applicable, in view of the language and evident purpose

of the contract here considered, unless the vein of mineral continued to the point where McLean ceased work." That case is plainly distinguishable from this. In that the decision was based upon the theory that as, by the terms of the contract, the shaft was to be sunk on the vein of ore cropping out on the claim, the requirements of the contract were fully met and complied with when the vein wholly gave out. In this case the contract is different. Here, the appellants were given the right to sink the shaft at such point as they might select, without reference to any vein or croppings, and to make such other and further developments as they might deem proper, and to take and appropriate to their use all ore extracted from the mine while doing the work. The obvious purpose of respondent was to have the mine opened to a depth of at least one hundred feet, in case appellants declined to purchase it; and of appellants, to satisfy themselves by making the stipulated explorations of the value of the property, before completing the purchase. The obligation of appellants to sink the shaft to the agreed depth was absolute, and was the consideration for the option given them. There were no modifying terms in the contract. The claim that the supposed value of the mine would not have been increased by sinking the shaft to the agreed depth, but would probably have been lessened, is based upon theory and not upon evidence or common knowledge. Respondent insisted that appellants should complete the shaft and crosscut in accordance with the contract, and we think he had a right to do so. The general rule as to the measure of damages in a case like this is correctly stated in *Woodworth v. McLean*, supra, and we think that rule applicable here, "in view of the language and evident purpose of the contract here considered." The judgment and order appealed from should be affirmed.

We concur: Searls, C.; Vancielief, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

DREW v. HICKS.

No. 19,199; January 25, 1894.

35 Pac. 563.

Nuisances—Prescriptive Right.—The Rule That a Right to maintain a nuisance cannot be acquired by prescription applies only to public, and not to private, nuisances.

Nuisance—Prescription.—Where Evidence Showing a Prescriptive right to maintain a private nuisance has been admitted without objection that it is not within the issues made by the pleadings, it is an abuse of discretion to refuse to allow defendant to amend his answer so as to allege the right.¹

Surface Waters.—The Rule That Land is Subject to the Flow of surface water from higher land does not apply to surface water turned on the lower owners by artificial changes made by those owning land above them.

APPEAL from Superior Court, San Bernardino County; John L. Campbell, Judge.

Action by H. L. Drew and C. W. Fairbanks against Sarah A. Hicks and William Curtis to enjoin defendants from constructing a bulkhead so as to turn water on plaintiffs' premises. From judgment for plaintiffs, defendants appeal. Reversed.

Rolfe & Freeman, Harris & Gregg and Paris & Satterwhite for appellants; Willis, Cole & Craig and C. W. C. Rowell for respondents.

HAYNES, C.—Appeal from the judgment and an order denying defendants' motion for a new trial.

¹ Cited with approval in *Hardman v. Kelley*, 19 S. D. 614, 104 N. W. 274, the court saying: "While in granting leave to amend pleadings, the court exercises a large discretion, yet that discretion should be exercised liberally in favor of granting such amendments, in order that the case may be fully tried upon its merits." In that case the trial court had properly stricken out of an amended answer certain defenses not conforming to the order allowing an amendment, but had denied a subsequent motion to amend, as specifically proposed, made before the next term of court, when such amendment would have entitled the defendant to judgment.

This case and the case of *Drew v. Cole* (No. 19,143, filed February 4, 1893, 3 Cal. Unrep. 765, 32 Pac. 229), were tried together in superior court and decided upon the same evidence. In *Drew v. Cole*, findings and judgment were for defendants, and upon appeal the judgment was affirmed, and a petition for rehearing denied. For a description of the premises of the respective parties, and a general statement of the facts involved, see *Drew v. Cole*, *supra*.

The complaint in *Drew v. Cole* was filed October 14, 1891, and in this case the complaint was filed November 9, 1891. The cases were different as to the specific relief sought, though depending largely upon the same facts and involving in the main the same questions of law. That case was brought to enjoin the defendants from constructing a bulkhead in a wash or ravine in Colton avenue, which separates the lands of plaintiffs and defendants, whereby the water would be prevented from flowing down that avenue, and would be turned, as was alleged, upon the premises of the plaintiffs. The defendants answered, and also filed a cross-complaint alleging that there was a natural watercourse over the lands lying to the eastward, which entered plaintiffs' premises at the southeast corner; that plaintiffs had built a dam across that watercourse at said corner of their land, and had excavated the ground on that portion of the avenue next plaintiffs' premises, whereby the water was turned down the avenue, and cut the ravine therein, and flooded defendants' lands, and, if the dam was allowed to remain, would cause them irreparable damage—and prayed that it be abated as a nuisance, and for an injunction. Findings and judgment went for the defendants, dismissing the complaint, and granting the prayer of the cross-complaint. In this case the complaint alleges, substantially as in the former complaint, "that the general trend of that section of the country is sloping at various grades from east to west and from southeast to northwest down to and across the premises of the defendants, and, in times of heavy storms, rain falling upon the same, or any large body of water flowing thereon, not absorbed by the soil, will, and always has, except when obstructed or diverted from its natural course as hereinafter stated, flowed in wide sheets of water down to, upon and across the premises of said defend-

ants," and charges that defendants, with a malicious and wrongful design to cause the water to flow down California street on the easterly side of defendants' premises, and with intent to discharge the same upon and across plaintiffs' premises, erected an embankment from two to four feet high along the east line of defendants' lands (that being the west side line of California street), and that, on top of said embankment on defendant Curtis' land, he attached wires to cottonwood trees, with the design to intercept brush and debris, which would constitute a barrier to the flow of water, and turn it down to and upon plaintiffs' land. The prayer is that the embankment and wire fence be abated as a nuisance.

The learned judge who tried these cases prepared a written opinion, in which he stated the material or more important facts found by him, and his conclusion thereon, and this opinion was signed and filed February 4, 1892; and afterward, on the 15th, formal findings were signed and filed in this case, the latter following quite closely the language of the complaint. In several important and controlling particulars, the facts in the latter are wholly inconsistent with the facts stated in the opinion filed by the court, and are also irreconcilable with the findings in *Drew v. Cole* in respect to facts equally pertinent and material to this case as to that. It is true that in *Drew v. Cole* there was no issue as to the embankment and wire fence, and the right of the defendants to maintain them was not adjudicated, while here that is the sole issue, and the sole right to be adjudicated. This conflict of findings, however, does not necessarily require a reversal of this case. If, upon all controlling questions of fact, the evidence was materially conflicting, we would be obliged to affirm both judgments, because of such conflict, unless there were other grounds for a reversal.

Appellants contend, not only that the findings are not justified by the evidence, but that the court erred in denying defendants' motion for leave to amend their answer to conform to the proofs given and received without objection. In the written opinion of the learned judge, which is incorporated in the statement on motion for a new trial, it is said: "I am satisfied that the testimony discloses the fact that the Hicks embankment is to-day substantially as it existed for the past fifteen years. From the testimony and examination

of the premises, I am equally well satisfied that the embankment is above the natural surface of the ground, and the only right defendant Hicks could have to maintain the same would be by reason of the fact that she had acquired a prescriptive right to do so. This contention is urged by counsel for defendant Hicks in their argument on the final submission of the cause. After a careful examination of the pleadings, however, I do not see how their position can be maintained. Under our system of practice, he who would avail himself of the privilege of the statute of limitation must do so by a demurrer or answer. No such objection having been taken in this case, it is to be deemed as waived." Counsel for defendants then gave notice of a motion to amend their answer, on the ground that the allegations of the pleadings do not conform to the facts proven at the trial, and therewith served a copy of the proposed amendment. Upon the hearing the motion was denied. Defendants excepted, and took a bill of exceptions thereto, and this refusal to permit the amendment is assigned as one of the grounds upon which their motion for new trial was based. Respondents, while controverting the fact that the embankment is in the same condition as formerly, cite authorities to the proposition that continuance of a nuisance for any length of time does not give a prescriptive right to maintain it. If that is true, as applied to the circumstances of this case, the motion to amend was properly denied, as it would not aid the defense. The first case cited to this proposition is *Mills v. Hall*, 9 Wend. 315. But this case does not sustain respondents' proposition. If this embankment is a nuisance, it is a private one. In the case cited it was claimed that the dam corrupted the air, by which the health of plaintiff's family was affected. The defendants moved for a nonsuit upon the ground that, the dam having been continued for twenty years, no action would lie. The court said: "There is no such thing as a prescriptive right, or any other right, to maintain a public nuisance. . . . If the defendants have for twenty years been permitted to overflow the plaintiff's land with their mill pond, so far as the injury to the land is concerned, they have by that length of possession acquired a right to use it in that manner, and are not responsible in damages to the plaintiff. So a man may overflow his own land; but, if such overflow spread disease

and death through the neighborhood, it must be abated, and he must respond in damages for any special injury which any individual may have sustained from it."

All the cases cited by the respondents to this point are cases of public nuisance. But this question has been settled in this state, as well as elsewhere. In *Learned v. Castle*, 78 Cal., at page 46, 18 Pac. 872, and 21 Pac. 11, it was said: "And to thus wrongfully cause water to flow upon another's land, which would not naturally flow there, is to create a nuisance per se. It is an injury to the right, and it cannot be continued because other persons might have a low estimate of the damages which it causes. And especially is this so when the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude." See, also, *Richards v. Dower*, 64 Cal. 64, 28 Pac. 113, and other authorities cited in the support of the above quotation. I think the court erred in not granting the amendment, as all the evidence in relation to the purposes for which the embankment was made, and the length of time it had been maintained, had been received without any objection or any suggestion that it was not within the issues. Nor does it appear that it would have caused any delay in the disposition of the case, or that it would have made it necessary to take other or further testimony, while it is conceded by the learned judge that if the issue had been made, the proofs already before him would have required a different judgment. If the facts had been found in relation to the embankment as indicated in the opinion of the court, it would be quite clear that a judgment for defendants, which those facts require, could not have been sustained, because not within the issues, and in such case the judgment would have been reversed, and the cause remanded, in order that the answer might be amended to correspond with the facts proved and found, as was done in *Bryan v. Tormey*, 84 Cal. 130, 24 Pac. 319. Justice would clearly have been promoted by the amendment, and no wrong would have been inflicted upon the plaintiff by allowing it, and under such circumstances it was an abuse of discretion to deny the motion. Or if, for any reason, the court was of the opinion that good practice required its denial, it was still sufficient ground for granting a new trial, followed by leave to amend the answer, since it clearly appeared that, such

amendment being made, the facts required a different judgment. Most of the questions likely to arise upon a new trial have been noticed in the opinion in *Drew v. Cole*, supra, though some of them might be made more specific and which are especially called to our attention in respondent's brief. So far as the embankment is concerned, a prescriptive right to maintain it would make them immaterial, though we cannot assume that there may not be different evidence upon that point, but in any event the right to maintain the wire fence does not appear to have been acquired by prescription. We do not question the proposition laid down by respondents that where two fields or farms adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. But this question is not always to be tested by the conditions existing at the time the suit is brought. What is meant by "the natural flow" is to be taken as of a time when its course has not been changed or affected by artificial means. As stated by the supreme court of Ohio, "the lower owes a servitude to the upper to receive the water which naturally runs from it, provided the industry of man has not been used to create the servitude": *Butler v. Peck*, 16 Ohio St. 334. See *Ogburn v. Connor*, 46 Cal. 352, where *Butler v. Peck*, and *Washburn on Easements*, second edition, page 427, to the same effect, are cited and approved. This principle is equally applicable to both plaintiffs and defendants. If before the surface of the lands above were changed, and natural channels or washes in which surface waters flowed were obstructed, the water did not flow over defendants' lands "in times of usual, ordinary and expected freshets," they have a right to protect themselves against surface water turned upon them by artificial changes made by those owning the land above them, and so far as they find it necessary for their protection, turn the water to channels where it originally flowed, provided they have not delayed until a right by prescription has been acquired against them. Nor does the flow of water over lands in case of extraordinary freshets, or such as are not expected or reasonably anticipated, affect the question. The supreme court of Pennsylvania (*McCoy v. Danley*, 20 Pa. 89), speaking of "usual, ordinary and expected freshets," for the consequences of which one might be liable said: "A flood is

another thing. It may not come for years together. When it does come it is a visitation of Providence, and the destruction it brings must be borne by those on whom it happens to fall." A cloudburst, such as the record shows occurred in 1891, could not aid materially, if at all, in determining the "natural flow" of surface water as it formerly existed nor affect the rights of any of the parties to this case. It was one of those inevitable calamities which are to be borne without complaint and cannot convert a fence or an embankment, otherwise lawful and proper into a nuisance which may be abated. I think the judgment and order appealed from should be reversed, with leave to the defendants to amend their answer.

We concur: Vanciel, C.; Belcher, C.

HARRISON and GAROUTTE, JJ.—For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, with leave to the defendants to amend their answer.

JOHNSON v. JOHNSON.

No. 15,273; January 26, 1894.

35 Pac. 637.

Divorce—Cruelty.—A Complaint Alleging extreme cruelty, in that "about three years ago" defendant, without cause, struck plaintiff, and since has continually, whenever they have been together, used vile language to her, is not demurrable as failing to specify the acts relied on.

Divorce—Cruelty—What Constitutes.—Plaintiff's physician testified, *inter alia*, that her nose had been flattened by a blow that defendant admitted having struck her, but said he did not mean to, and seemed ashamed. Their son swore that he had heard his father call his mother insulting names as long as she lived with him. Since the assault, plaintiff had been generally sick in bed, and her husband's language seemed to make her worse. Held, sufficient proof of "extreme cruelty," consisting of a blow and abusive language, to the injury of plaintiff's health.

Divorce—Award of Community Property.—Plaintiff being an invalid and defendant more than able to make his living, it was proper for the court, while allowing no permanent alimony, to give plaintiff, besides most of the household furniture, the whole community house and lot, which was worth only \$3,000, and was subject to a mortgage of \$2,500.

APPEAL from Superior Court, City and County of San Francisco; F. W. Lawlor, Judge.

Action for divorce by Ane Johnson against Neils Johnson. Decree for plaintiff. Defendant appeals. Affirmed.

Nagle & Nagle for appellant; Neils Johnson and R. B. Wallace for respondent.

VANCLIEF, C.—Action for divorce on the ground of extreme cruelty in which the plaintiff prevailed. Besides the divorce, the decree awarded to plaintiff the custody of an infant son of the parties and the greater portion of the community property, but no permanent alimony. Defendant appeals from the judgment and from an order denying his motion for a new trial.

1. Defendant demurred to the complaint on the grounds that it is ambiguous, uncertain, and unintelligible, in that it does not appear therefrom "when or where defendant was guilty of the alleged extreme cruelty," nor "what was the nature, character, or extent of the alleged acts of extreme cruelty." The allegations of the complaint charging cruelty are as follows: "That during their marriage defendant has been guilty of extreme cruelty to plaintiff, in this: That about three years ago said defendant struck plaintiff without cause, thereby rendering her insensible, and since said time said defendant has wrongfully and unjustly, and without any provocation, continually used vile and offensive language to plaintiff whenever said plaintiff and defendant have been together, thereby inflicting upon said plaintiff grievous mental suffering, by reason of which mental suffering so inflicted by defendant, as aforesaid, plaintiff has been injured in health to such a degree that, by reason of the infliction of said mental suffering as aforesaid by defendant, said plaintiff has become sick, and her health has been greatly impaired. That further cohabitation between the plaintiff and defendant will en-

danger the physical health and the life of this plaintiff." This seems sufficiently definite as to the times, nature and extent or degree of the cruelty; and, from the averment that it was commenced by a beating three years before the commencement of the action, and was thence continued by abusive language "whenever said plaintiff and defendant have been together," it must be understood that the places were wherever "said plaintiff and defendant had been together" during that period of three years, which places were presumably as well known to the defendant as to plaintiff. The demurrer does not specify, as a deficiency, that the abusive language is not set out. As against the objections specified in the demurrer, I think the complaint is barely sufficient.

2. The findings as to the fact of extreme cruelty are in the language of the complaint, and therefore support the judgment in this respect; and it is not denied that they are sufficient in all other respects.

3. The evidence was sufficient to justify the findings. The plaintiff testified to all the acts of cruelty alleged, and was sufficiently corroborated by the testimony of her physician and her son. As to the beating, the physician testified, among other things, that by a forcible blow her nose was crushed down flat on her face, and that defendant admitted he struck her, but said he didn't intend to, and appeared to be ashamed of what he had done. As to his abusive language, the son testified: "I have heard my father call my mother hard names, such as 'whore,' 'bastard,' and 'son-of-a-bitch.' My mother's testimony in this regard is true. He called her such names as long as she was home." It appeared without controversy that, during the greater portion of the time after the beating, the plaintiff was sick, and thereby confined to her bed; and the tendency of the evidence is to prove that defendant's abusive language aggravated her disease.

4. Appellant contends that his offenses were condoned by the plaintiff. But condonation was not pleaded by defendant (Bishop on Marriage and Divorce, secs. 619, 645); and if it had been pleaded, there is no evidence tending to prove it, unless the mere fact that she continued to cohabit with him until the last of a long series of acts of cruelty had such tendency by implication. Conceding that, under some circumstances, cohabitation after having suffered acts of cruelty

implies condonation, it must be remembered that "all condonation, especially the implied, is upon the condition both that the offense shall not be repeated, and likewise that continually afterward the party forgiven shall treat the other with conjugal kindness; whereupon a breach of the condition revives the original right of divorce": 2 Bishop on Marriage and Divorce, sec. 308; Civ. Code, sec. 117. And section 118 of the Civil Code further provides: "Where the cause of divorce consists of a course of offensive conduct, or arises in case of cruelty from successive acts of ill-treatment which may aggregately constitute the offense, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone." There is no evidence and no pretense of any express agreement to condone.

5. The house and lot awarded to plaintiff was community property, and subject to a mortgage of \$2,500 and seven months' interest thereon. In his answer, defendant alleged this property to be worth only \$3,000, and admitted the mortgage as above stated. The greater portion of the household furniture was also given to plaintiff. Appellant contends that the court erred in awarding the whole lot and house to plaintiff, but I think the allowance was proper and just. It appeared that plaintiff was in bad health and that defendant was able to earn more than was necessary for his support. I think the order and judgment should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

WATKINS v. WILHOIT et al.*

No. 18,167; January 26, 1894.

35 Pac. 646.

Assignment for Creditors—Failure to Record.—Under Civil Code, section 3465, which declares an assignment for the benefit of creditors "void" as against nonassenting creditors, unless recorded as required by sections 3463, 3464, no preliminary suit is necessary by a nonassenting creditor to set aside an unrecorded assignment before he can maintain a creditors' bill to apply the assignor's property in the assignee's hands on a judgment against the assignor.

Assignment for Creditors.—The Fact That an Unrecorded Assignment may be valid as between the parties does not render it merely voidable as against nonassenting creditors, since Civil Code, section 3465, expressly declares it "void" as against them.

Assignment for Creditors.—The Right to Bring a Creditors' Bill to set aside an assignment for the benefit of creditors as in fraud of plaintiff's rights accrues when the execution on plaintiff's judgment against the assignor is returned unsatisfied, and not when the assignment was made.¹

*For subsequent opinion in bank, see 104 Cal. 395, 38 Pac. 53.

¹ Cited in *Williams v. Commercial Nat. Bank*, 49 Or. 505, 11 L. R. A., N. S., 857, 90 Pac. 1017, where it is held that the statute begins to run from the return of the execution.

Cited in *Ziska v. Ziska*, 20 Okl. 644, 95 Pac. 258, 23 L. R. A., N. S., 1, the court saying that inspection of the case cited will show it does not hold that exhaustion of the plaintiff's legal remedy can be shown only by an allegation that the debtor has had execution issued and retained nulla bona.

Cited and approved in *Ziska v. Ziska*, 20 Okl. 641, 95 Pac. 256, 23 L. R. A., N. S., 1, which was a suit to set aside a conveyance as fraudulent.

Cited in *Blackwell v. Hatch*, 13 Okl. 176, 73 Pac. 935, along with other cases, after which the court says: "A long list of authorities might be cited which support this doctrine, but the supreme court of the United States has enunciated the rule, and, even though there were a division of the authorities (which can hardly be said, although one or two intermediate courts have held to the contrary view), we feel constrained to follow the rule as laid down by that court. The appellee commenced his action within two years after his execution was returned and it was therefore not barred by the statute of limitations."

Recording Instrument—What Constitutes.—Civil Code, section 1170, which provides that an instrument is deemed to be recorded when deposited in the recorder's office for record, must be read in connection with section 1213, which requires the instrument to be "recorded as prescribed by law" before subsequent purchasers are charged with constructive notice of its contents; and hence no notice is imparted until the instrument is actually placed on record in the proper book, and then it relates back to the date of deposit for record.

Recording Instrument in Wrong Book.—The Negligence of the recorder in recording a conveyance in the wrong book cannot affect third persons, but the injury must fall on the parties to the conveyance, since they are the "parties aggrieved," within the meaning of the county government act (section 133), making the recorder liable to the parties aggrieved in three times the amount of damages occasioned by his negligence.

APPEAL from Superior Court, San Joaquin County; Ansel Smith, Judge.

Action in the nature of a creditors' bill by C. G. Watkins against R. E. Wilhoit, B. F. Langford and M. E. Bryant. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

John B. Hall for appellant; F. T. Baldwin, P. S. Wilkes and J. C. Campbell for respondents.

VANCLIEF, C.—This action is of the nature of a creditors' bill in equity to subject property in the hands or under the control of the defendants Wilhoit and Langford to the payment of a judgment at law against defendant Bryant in favor of the plaintiff. A demurrer to the complaint having been sustained, and plaintiff having declined to amend his complaint, judgment passed for defendants. The plaintiff has appealed from the judgment upon the judgment-roll containing a bill of exceptions showing that the demurrer was sustained on the grounds "that the complaint does not state facts sufficient to constitute a cause of action, and that the action is barred by the statute of limitations."

The complaint shows that on June 2, 1890, the plaintiff recovered a judgment against Bryant for the sum of \$2,342.60 on a promissory note made by the latter to the former on January 17, 1885, and that no part of the judgment has been

paid. That before, and on February 16, 1886, said Bryant was indebted to others besides the plaintiff, and was then, and ever since has been, insolvent, though he was then the owner of considerable real and personal property in the county of San Joaquin, where he resided. That on said sixteenth day of February, 1886, he executed to defendants Wilhoit and Langford and one Charles Bamert a deed purporting to convey to them all his real and personal property, except such as was exempt from execution, in trust for the benefit of all his creditors, without preference to any, except as provided by law, "to sell and dispose of said real estate and personal property, and to collect the said book accounts and choses in action, using a reasonable discretion as to the times and modes of selling and disposing of said estate as it respects making sales for cash or on credit, at public auction or by private contract or sale, with the right to compound for the said book accounts and choses in action, taking a part for the whole where and when the trustees deem and decree it expedient so to do." Then, after applying the proceeds to the payment of his debts according to law, to pay the surplus, if any, to him, Bryant. This instrument, with an inventory of the property thereby assigned attached thereto and made a part thereof, and the written acceptance of the trust by Wilhoit and Bamert, are fully set out in the complaint. It is next alleged that said instrument has never been recorded in the office of county recorder of said county in any book of records therein of grants, deeds or transfers of real estate, or in any book kept in said office for the recordation of conveyances or mortgages of either real or personal property, or otherwise or elsewhere recorded in said office, save and except that the instrument was, on the sixteenth day of February, 1886, transcribed into a book kept in said office, labeled "Book G, Miscellaneous." That within thirty days after the date of said instrument, pursuant to an order of a judge of the superior court, Wilhoit, Langford and Bamert executed a bond, with sureties, for the faithful discharge of the trust, as required by section 3467 of the Civil Code, and thereupon took possession of all the property described in said instrument, claiming title thereto as assignees. "That said plaintiff at no time, either before or at the time of or since the execution of said instrument, assented to the execution thereof, or to any

matter or thing therein contained, and has never assented to any act of said Wilhoit, Langford and Bamert, or any or either of them, done or claimed to be done in the execution of the trust in said instrument mentioned." That at different times between February 16, 1886, and the commencement of this suit, said Wilhoit, Langford and Bamert have sold and disposed of all said property, real and personal, and have received from the sales of said lands \$4,000, from the sale of said personal property, \$4,000, and from rents, issues and profits of said real property a sum not less than \$10,000; and that the said Wilhoit and Langford "now have in their hands or under their control the full sum of eighteen thousand dollars—proceeds of the property of said Bryant, so as aforesaid coming into their hands, to which they assert no right or claim other than a right or claim under said pretended assignment of February, 1886"; said Bamert having died in January, 1891. That on January 29, 1892, plaintiff caused to be issued and placed in the hands of the sheriff an execution on his said judgment against Bryant upon which on March 29, 1892, the sheriff indorsed his return that he had "levied upon all moneys, goods, credits, effects, debts due or owing or any personal property of any kind belonging to M. E. Bryant, the judgment debtor named in the annexed writ, and in the custody or under the control of R. E. Wilhoit and B. F. Langford, or either of them"; and proceeds to state the acts constituting a garnishment as required by law, to which Wilhoit and Langford orally answered that they did not owe Bryant anything, but declined to make any written answer; and further returned that he had "made diligent search and inquiry, and had not been able to find any property of any kind in San Joaquin county belonging to M. E. Bryant out of which he could make the sums due on the annexed execution," and the same is returned unsatisfied. It is next alleged that Wilhoit, Langford and Bamert have not, nor has either of them, accounted for or paid to any creditor of Bryant said funds in their hands, and have refused to deliver the same, or any part thereof, to the sheriff for the satisfaction of said execution, and claim that they rightfully hold the same for the uses and purposes of said pretended assignment. It is further alleged that said pretended assignment is, and ever has been, null and void as against the plaintiff, and that plaintiff has

a lien on said money in the hands of Wilhoit and Langford for the payment of his said judgment. The prayer of the complaint is that it be adjudged that the instrument of February 16, 1886, is null and void as against the plaintiff; that plaintiff has acquired a valid lien upon the funds in the hands of Wilhoit and Langford for the payment of his judgment against Bryant; that they pay said judgment, with interest and costs, from said funds; and that plaintiff have such other and further relief as the court may deem equitable.

The foregoing is the substance of the complaint so far as pertinent to the issues of law raised by the demurrer. It should be observed that the assignment was made under title 3, part 2, of division 4 of the Civil Code, before the amendment thereof in March, 1889. The grounds of the demurrer are: (1) That the complaint does not state a cause of action; (2) that the action appears to be barred by section 338, and also by section 343, of the Code of Civil Procedure; and (3) that the complaint is uncertain, and also ambiguous in certain specified particulars. The theory of the complaint is that, as between the defendants and the plaintiff, the assignment of Bryant to the other defendants is void, and that plaintiff is entitled to pursue the \$18,000 in their hands or under their control for the satisfaction of his judgment, as though that assignment had not been attempted. If, upon the facts alleged, this position can be sustained, I think the complaint states a cause of action not barred by the statute of limitations, with sufficient certainty, and without ambiguity.

1. It is claimed by appellant that the assignment is void for the reason that it was not recorded. Section 3458 of the Civil Code provides that an assignment for the benefit of creditors "must be in writing . . . and recorded as required by sections 3463 and 3464." Section 3459 provides: "Unless the provisions of the last section (3458) are complied with, an assignment for the benefit of creditors is void against every creditor of the assignor not assenting thereto." Sections 3463 and 3464 provide that the assignment "must be recorded" and the inventory "filed with the recorder," etc., in the county or counties as therein stated. Section 3465 provides: "An assignment for the benefit of creditors is void against creditors of the assignor, and against purchasers and encumbrancers in good faith and for value, unless it is recorded

. . . . pursuant to section 3463 within twenty days after the date of the assignment." Section 3400 requires that "where the assignment embraces real property, it is subject to the provisions of article 4 of the chapter on recording transfers as well as to those of this title." Article 4 of the chapter on recording transfers (sections 1213 and 1215) shows that assignments for benefit of creditors embracing real property must be recorded as conveyances of real property. Section 3473 enacts that "an assignment for the benefit of creditors, which has been executed and recorded so as to transfer the property to the assignee, cannot afterward be canceled or modified by the parties thereto without the consent of every creditor affected thereby." In view of these provisions, I think the assignment was void as to plaintiff, who was a creditor at the time of the assignment, and did not assent thereto; and therefore that it interposes no obstacle to the relief sought by this action, which is to have Bryant's property, in the hands of Wilhoit and Langford, applied to the satisfaction of plaintiff's judgment against Bryant. The assignment being void "against the creditors of the assignee who did not assent thereto, and against purchasers and encumbrancers in good faith and for value" (section 3465), no preliminary suit by the plaintiff against the parties to it, to set it aside, was necessary. As against the parties to the assignment, at least, nothing more than plaintiff's election to disregard it was necessary.

Yet it is contended by counsel for respondents that the assignment has so far operated upon and affected the plaintiff as to prevent him from pursuing Bryant's property in the hands or under the control of Wilhoit and Langford, otherwise than by suit in equity to set it aside, on the ground that it is merely voidable, and that he is not at liberty to disregard it as being void as against him, although the statute declares it to be so; that the word "void" is often used in the sense of "voidable merely," and must have been used in that sense in the sections of the Civil Code above quoted, for the reason that an assignment for the benefit of creditors is valid as between the parties to it, though not recorded. The theory which seems to have led counsel for respondents to this conclusion is that an instrument or contract cannot, at the same time, be valid as between the parties to it and void as against third persons whose rights it purports or was intended to

affect; and that it must have the intended effect upon such third persons, until they avoid it by procuring a decree of a court of equity setting the instrument aside so far as it affects them. Yet upon this theory the instrument would still be valid as between the parties to it, after having been nullified as to third persons, and would have its intended effect upon the parties, and also upon the subject matter not taken to satisfy the decree in favor of third persons; and therefore would at the same time be valid between the parties and void as to third persons whom it was intended to affect. It follows that the theory propounded is not sound, and that a contract may, at the same time, be binding upon one or all of the parties to it, and wholly void as to others whom it was intended to bind or affect; and surely the legislature has the power to make it so. While it is true that the word "void" has been inappropriately used by lawyers and judges, it nevertheless has a determinate meaning in law when applied, as an adjective, to contracts, statutes and other acts intended to effect some purpose or purposes; which meaning is that such contracts, statutes or acts are totally ineffectual for the purposes, or for a part of the purposes, intended. If totally ineffectual for any purpose intended, they are simply void. If totally ineffectual as to only a part of such purposes, they are only relatively void. This distinction is not identical with that between void and voidable, since a voidable act or contract takes effect as intended, and continues to be effectual to all intents and purposes until it is set aside or nullified as to all or some part of the persons or things which were before affected by it. For example: The contracts of infants and contracts procured by fraud, if not otherwise against law or the policy of law, are not void, but only voidable, because they take effect when made, and remain effectual until avoided; whereas void acts, though in the form of contracts or statutes, never take any effect as such; and acts which are only relatively void are denied any effect, even temporary, against a part or class of the persons or things that they purport or were intended to bind or affect. As bearing directly and indirectly upon these distinctions, see Wharton on Contracts, sec. 28, and notes; and *Pearsoll v. Chapin*, 44 Pa. 13. Therefore, when the legislature has declared an act or instrument void, or relatively void, it must be understood to have used the

word "void" in its primary and ordinary sense as above defined, unless it be made apparent by the context, or by some other statute in *pari materia*, that it was used in a different sense. But, as applied to assignments for the benefit of creditors in the Civil Code, I perceive nothing in the context, and find nothing in either of the codes, indicating that the word was used by the legislature in any other than its ordinary sense.

But conceding, for the sake of argument merely, that the assignment in question is only voidable, and that the object of this action is to set it aside, as contended by respondents' counsel, still the action is not barred by either of the sections of the statute pleaded, unless the cause of action accrued more than three years before the commencement of the action. It is properly conceded that the action is a creditors' bill in equity to enforce the application of Bryant's property in the hands of and claimed by Wilhoit and Langford to the satisfaction of plaintiff's judgment against Bryant. That such an action is allowable in this state, notwithstanding the provisions of the Code of Civil Procedure for proceedings supplementary to execution, there never has been any question since the decision in the case of *Swift v. Arents*, 4 Cal. 390. And see *Swinford v. Rogers*, 23 Cal. 234; *Reed v. Goldstein*, 53 Cal. 296; *Harmon v. Page*, 62 Cal. 448. But it is essential to the cause of such an action that the plaintiff should have exhausted his remedy at law, otherwise a court of equity has no jurisdiction of the creditor's bill (3 Pomeroy's Equity Jurisprudence, sec. 1415); and the fact that an execution has been returned *nulla bona* is conclusive that the legal remedy has been exhausted: *Baines v. Babcock*, 95 Cal. 591, 29 Am. St. Rep. 158, 27 Pac. 674, and 30 Pac. 776; *Taylor v. Bowker*, 111 U. S. 110, 28 L. Ed. 368, 4 Sup. Ct. Rep. 397. In the last-cited case the court, by Mr. Justice Harlan, said: "We are of opinion that the complainant's cause of action should not be deemed to have accrued until the return of the execution": Page 117, 111 U. S., and page 400, 4 Sup. Ct. Rep. Plaintiff obtained judgment against Bryant June 2, 1890, on which execution was issued January 29, 1892, and returned *nulla bona* March 29, 1892. This action was commenced May 7, 1892, less than two months after the return of the execution, and less than two years after the rendition of the judgment.

Since the judgment was a necessary condition precedent to the creditor's bill, it follows that the action was not barred by any statute of limitation.

It is further claimed by respondents that the depositing of the assignment with the recorder on the day of its date was a recordation thereof as required by law, though it has never been transcribed in any book of records in which the law requires deeds, grants or transfers of real estate to be recorded, and only in a book in which miscellaneous instruments are recorded in supposed accordance with the twelfth subdivision of section 124 of the county government act, which book, however, is not expressly authorized, and for it no index is required to be kept. In support of this point, section 1170 of the Civil Code is cited, and solely relied upon, which reads as follows: "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office with the proper officer for record." Literally interpreted, without regard to other provisions of the codes in *pari materia*, and without considering the various objects of recording different instruments, or the differing legal consequences of failing to record, this section would seem to make the depositing of any instrument with the recorder equivalent in effect to the actual recording of it in the appropriate book, though it should never be so recorded; and without such an interpretation it will not answer the purpose for which it is cited by respondent. Yet no case has been cited, and I have been able to find none, in which it has been held that the transcribing of an instrument in a different book from that in which the law requires it to be recorded effects the object of the law, or answers any lawful purpose; but there are many cases to the contrary. In the first place, it is to be observed that section 1170 does not state the effect of recording, nor of a failure to record, any kind of an instrument; such effect generally being declared in each distinct provision of the statute requiring a specific class of instruments to be recorded; but the effect is not uniform in all the classes. For instance, sections 1213 and 1214, Civil Code, declare the effect of recording, and also a failure to record, conveyances of real property, but the effect of a failure to record such conveyances is not commensurate with that of a failure to record an assignment of real property for the

benefit of creditors; since the latter, without being recorded, is void, not only against subsequent purchasers and mortgagees without notice and for value, but also against nonconsenting creditors of the assignor, without regard to actual notice. Section 1213 declares that the effect of recording a conveyance of real property is as follows: "Every conveyance of real property, acknowledged or proved, and certified and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees." By this section no effect is given to the mere filing of the deed for record until it is actually "recorded as prescribed by law," when the actual record is made to relate back to the date of filing with the recorder; and, since section 1213 is the only provision declaring the effect of recording a conveyance of real property, it cannot be said to be inconsistent with section 1170, which says nothing about the effect, but should be read as an addition to and qualification of section 1170; and a fair construction of the two sections, thus read, is that a conveyance is deemed to have been recorded when filed for record only by relation from the time when it was actually recorded. A statute of Missouri provided that every instrument "certified and recorded in the manner prescribed shall, from the time of filing the same with the recorder, impart notice," etc., and it was held under this statute that no notice was imparted until the instrument was actually placed on record, and then it related back to the date of filing for record and that the statute must be so understood: *Terrell v. Andrew Co.*, 44 Mo. 309. Mr. Webb, commenting on this case, says: "The greater weight of reason, if not of authority, seems to be in favor of this view of the law": Webb on Record Titles, secs. 16-18, and cases there cited. In *Sawyer v. Adams*, 8 Vt. 175, 30 Am. Dec. 459, it was said: "There is but little doubt that 'recording' means the copying of the instrument to be recorded into the public records of the town, in a book kept for that purpose, by or under the superintendence of the officer appointed therefor. This recording may and does take effect from the time the deed or instrument is delivered to the officer, if it is in due time placed upon the records. The delivery of the deed to the town clerk, or his minute on the same that he has received the same for record, is not recording; but the record, if com-

pleted, is considered as taking effect from that time." In that case the deed was recorded in an improper book, and the court further said: "The act of the town clerk was as wholly inoperative as if he had written this deed on a slate or copied it into his family record." See, also, 2 Pomeroy's Equity Jurisprudence, secs. 653, 654; *Flanagin v. Wetherill*, 5 Whart. (Pa.) 280; *Reigart's Appeal*, 4 Pa. 477; *Watson v. Bagaley*, 12 Pa. 164, 51 Am. Dec. 595; *Wallace v. Wainwright*, 87 Pa. 264; *Rennie v. Bean*, 24 Hun (N. Y.), 123; *Dewey v. Littlejohn*, 2 Ired. Eq. (37 N. C.) 495.

The precise point under consideration as to the effect of depositing an instrument for record seems not to have been directly decided in this state; but in *Lawton v. Gordon*, 37 Cal. 202, it was expressly assumed that the withdrawal of a deed from the recorder's office after filing suspends the effect of recording (constructive notice) during the time it is withdrawn, although it is afterward returned and copied into the appropriate book without being refiled. Section 130 of the county government act requires the recorder to indorse upon an instrument the date of its reception, to record the same without delay in the order in which it was received, "and must note at the foot of the record the exact time of its reception." In *Donald v. Beals*, 57 Cal. 399, the facts were that a mortgage to plaintiff was deposited for record on April 15th, and properly indorsed as received for record on that day, but when he recorded it the recorder noted at the foot of the record that it was received for record on April 18th. Held, that the latter date, though inconsistent with the filing, and proved to be erroneous, must prevail over the true date indorsed on the mortgage. This decision, though indubitably correct, is inconsistent with the literal interpretation of section 1170, Civil Code, contended for by respondents, since it shows that an instrument cannot be deemed to be recorded when deposited with the recorder until it is properly recorded "as prescribed by law." In other words, sections 1170 and 1213, Civil Code, must be read and construed together. So, in *Chamberlain v. Bell*, 7 Cal. 293, 68 Am. Dec. 260, a prior defective record of a prior deed was held to have imparted no notice to a subsequent purchaser. The defect in the record was the omission of the numbers by which the lots conveyed were described by mistake of the recorder. In the opinion

the court cite as authorities *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 288, and *Sanger v. Craigue*, 10 Vt. 555. In *Meherin v. Oaks*, 67 Cal. 57, 7 Pac. 47, cited by respondents, the instrument defectively recorded was a personal mortgage, of which it was said that the defendant had actual notice, and the decision cannot properly be supported on any other ground than such actual notice; but, since actual notice to a nonconsenting creditor of an assignment for the benefit of creditors is immaterial, that case is not in point.

It is suggested that the defendants should not suffer for the negligence of the recorder without their fault. The recorder is "liable to the party aggrieved for three times the amount of the damages which may be occasioned thereby" (County Government Act, sec. 133), and the question is, Which is the aggrieved party, whose sole remedy is by action against the recorder? Upon this question the cases are divided, but I think the weight of authority, including California cases, is opposed to the view of respondents (*Webb on Record Titles*, sec. 18, and notes), though Mr. Devlin, in his work on *Deeds* (sections 683-696), expresses a contrary opinion. Whether the party who deposits a deed for record is the aggrieved party whose remedy is against the recorder in case it is not properly recorded depends upon a solution of the question above considered and answered. If the mere deposit of his deed with the recorder by the grantee or assignee is to be deemed a recording, and to have the full legal effect of a record, though not afterward actually recorded as required by law, then such grantee or assignee is not aggrieved by the negligence or fraud of the recorder; otherwise he is. As against subsequent purchasers and mortgagees, and as to nonconsenting creditors in cases of assignment for benefit of creditors, it is the duty of the grantee, not only to deposit his deed with the recorder, but to see that it is actually recorded in the proper book, as prescribed by law; and, if not so recorded, it has no effect whatever upon creditors of the assignor nor upon subsequent purchasers or mortgagees in good faith (Civ. Code, sec. 3465); and, therefore, the nonconsenting creditors are not aggrieved by the failure to record. As against them, an unrecorded grant or assignment for the benefit of creditors is void, and raises no equities even though they had actual notice of it: *Dewey v. Littlejohn*, 2 Ired. Eq.

(37 N. C.) 495. And this is admitted by Mr. Devlin, as I understand him, to be a legitimate deduction from the authorities which hold that constructive notice of an instrument does not date from its deposit for record, unless afterward duly recorded: Sees. 683, 684. I think the judgment should be reversed and the court below directed to overrule the demurrer.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is reversed and the lower court is directed to overrule the demurrer.

RUSS LUMBER & MILL CO. *v.* ROGGENKAMP et al.

No. 19,242; January 30, 1894.

35 Pac. 643.

Mechanics' Liens—Notice to Owner.—Under Code of Civil Procedure, section 1184, requiring the owner of a building to retain sufficient funds to pay a claim for materials, furnished by a materialman who has given notice of his claim to such owner, a materialman who serves the required notice acquires a prior right to the fund in the hands of the owner, due the contractor, though the contractor subsequently abandons the contract.

APPEAL from Superior Court, San Bernardino County; John L. Campbell, Judge.

Action by the Russ Lumber and Mill Company against William Roggenkamp, W. H. Pierce, J. Lee Burton and the Union Bank of Redlands to enforce a mechanic's lien. From a judgment for plaintiff against defendant Roggenkamp, personally, said defendant appeals. Affirmed.

Goodcell & Leonard for appellant; Curtis, Oster & Curtis for respondent.

PER CURIAM.—This action was brought to foreclose a mechanic's lien upon a dwelling-house constructed for de-

fendant Roggenkamp, and owned by him. All the defendants made default, except the defendant Roggenkamp; and he alone prosecutes this appeal upon the judgment-roll. Defendant Roggenkamp entered into a written contract with the defendant Pierce for the construction by the latter of the building in question, for the price of \$2,750, and this contract was made and filed as required by law. The plaintiff furnished material to the contractor, Pierce, for which there is still due the plaintiff the sum of \$977.23. On June 26, 1891, the plaintiff served upon defendant Roggenkamp written notice that he had furnished material to the contractor to the amount of \$963.87. At that time there was due the contractor \$687.50, and to become due the further sum of \$2,062.50. On July 3, 1891, the contractor ceased work, and abandoned the contract. The work was continued by Roggenkamp, under the supervision of his architect, defendant J. Lee Burton, and the building completed on October 23, 1891. Plaintiff filed its claim of lien on December 18, 1891, which was fifty-six days after the completion of the building. The lien was disallowed, and judgment rendered against defendant Roggenkamp, personally, for the sum of \$687.50, with interest and costs. The sole question involved in the case was passed upon in *Bates v. Santa Barbara Co.*, 90 Cal. 543, 27 Pac. 438. A careful perusal of the brief of appellant fails to convince us either that this case can, in principle, be distinguished from that, or that the question here was not necessarily involved there. The judgment appealed from is affirmed, upon the authority of *Bates v. Santa Barbara Co.*, *supra*.

OGDEN v. PACKARD.

No. 19,306; January 31, 1894.

35 Pac. 642.

Foreclosure of Mortgage—Attorney Fees.—On Appeal from a judgment foreclosing a mortgage which provides for the allowance of reasonable attorney's fees on foreclosure, the allowance will not be disturbed if the appeal is brought up on the judgment-roll alone, without exceptions, and there is nothing in the record to show that the court abused its discretion in making the allowance.

APPEAL from Superior Court, San Bernardino County; George E. Otis, Judge.

Action by Matthew B. Ogden against C. E. Packard. From a judgment for plaintiff, defendant appeals. Affirmed.

W. J. McIntyre for appellant; Irvington & Adair for respondent.

VANCLIEF, C.—Action to foreclose a mortgage which provided that, “in the event of the foreclosure of said mortgage, reasonable attorney’s fees shall be taxed by the court, and included and paid in the bill of costs.” It is alleged in the complaint that \$500 is a reasonable attorney’s fee to be allowed under said provision of the mortgage. The answer simply “denies that \$500 is a reasonable attorney’s fee,” without stating whether such fee is unreasonably large or unreasonably small or what sum would be a reasonable fee. The court found the amount due on the mortgage notes to be \$16,571.65, and fixed and allowed as plaintiff’s attorney’s fees the sum of \$500, and for the payment of these sums ordered a sale of the mortgaged property in the usual mode. Findings of fact were waived, but the amount due on the notes and the sum allowed for attorney’s fees are recited in the decree. The defendant brings this appeal from the final decree, upon the judgment-roll, and without any exceptions; and the only point made is that the court exceeded its discretionary power in fixing and allowing plaintiff’s attorney’s fees, and asks that the judgment be modified by deducting from the attorney’s fees \$350. There is nothing in the record tending to show any abuse of the discretionary power of the court; and, indeed, for aught that appears, the appellant may have expressly acquiesced in the order fixing the attorney’s fees. I think the judgment should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

RASKIN v. ROBARTS et al.

No. 19,263; January 31, 1894.

35 Pac. 763.

Appeal—Time for Taking—Dismissal.—An appeal from a decree, not taken within a year from its entry, will be dismissed.

Executors—Accounting.—Where an **Executor Stated** in his petition for the probate of the will that a part of the estate consisted of a sum of money in his hands, and he died without rendering an account, a finding that such sum came into his hands while acting as executor is justified.

New Trial.—Where There is No Specification in the Statement on motion for a new trial that a finding of fact is not justified by the evidence, and counsel do not make that point, the question whether it is justified cannot be considered on appeal from an order denying a new trial.

Appeal.—The Question Whether a Conclusion of Law is supported by the findings of facts cannot be considered on appeal from an order denying a new trial.

APPEAL from Superior Court, Los Angeles County;
Walter Van Dyke, Judge.

Action by Charles Raskin, administrator with the will annexed of Jean Leonis, deceased, against John Robarts and another, executors of Miguel Leonis, deceased. From an interlocutory decree for plaintiff and from an order denying a motion for a new trial defendants appeal. Appeal from decree dismissed. Affirmed on appeal from order denying new trial.

S. M. White, Brosseau & Thomas and John Robarts for appellants; Reymert & Orfila and Wells, Munroe & Lee for respondent.

VANCLIEF, C.—Jean Leonis, plaintiff's testator, died March 6, 1888, leaving his last will, by which he gave and bequeathed to his brother, Miguel Leonis (defendant's testator), all and singular, his property, "real, personal and mixed, of whatsoever nature, and wheresoever the same may be, of

which I may be the owner, or of which I may be possessed, or of which I may be entitled to perfect the title thereto, at my death," and nominated said Miguel as the executor of said will to act as such without bond. On April 16, 1888, the will was admitted to probate in the superior court of Los Angeles county, and said Miguel duly appointed executor thereof, and thereupon Miguel qualified as executor, and continued to act as such until September 20, 1889, when he died testate; and the defendants were appointed executors of his will on October 11, 1889, and on October 24, 1889, first published notice to the creditors of the estate of Miguel, and the term of ten months within which claims against the estate should have been presented expired on August 24, 1890. On September 3, 1890, the plaintiff, Charles Raskin, was appointed administrator with the will annexed of the estate of Jean Leonis, to fill the vacancy caused by the death of Miguel Leonis, which vacancy had continued from the death of Miguel (September 20, 1889) until September 3, 1890. On September 23, 1890, the plaintiff presented to the executors of Miguel's estate the claim upon which this action is based, which is as follows:

"March 19, 1888. Estate of Miguel Leonis, deceased, to Charles Raskin, Adm'r of the estate of Jean Leonis, deceased, debtor:

To recover the sum of two thousand dollars, United States gold coin, with interest, from March 19, 1888, to date, at the rate of 7 per cent per annum	\$2,350 00
Fifty head of cattle.....	1,000 00

\$3,350 00

"Said property having been intrusted to Miguel Leonis, deceased, by his brother, Jean Leonis, in his lifetime, and being part and parcel of the estate of Miguel Leonis, deceased."

This claim was rejected by the executors of Miguel on the day of its presentation, and thereafter this action was commenced.

The substance of the complaint, in addition to the facts above stated, is that the money and cattle described in the above claim came to the possession of Miguel Leonis, as executor of Jean Leonis, while he was acting as such, it being then the property of the estate of said Jean Leonis, and that he

continued to hold the same in his possession, as such executor, in trust for the benefit of the estate of Jean Leonis, until his (Miguel's) death, and that neither Miguel nor his executors have accounted for or delivered said money and property, or any part thereof, to plaintiff, or to the probate court. The prayer of the complaint is that defendants be required to render an account of said money and cattle, and all other property of the estate of Jean Leonis which came into the possession of their testator, Miguel Leonis, and that plaintiff have judgment against them for the recovery of all such money and property as, upon such accounting, may be found to belong to the estate of Jean Leonis, deceased. The defendants, by their answer, deny all allegations of the complaint relating to the property of the estate of Jean Leonis, and, as a further and separate defense, aver that plaintiff's alleged cause of action is barred by section 1493 of the Code of Civil Procedure. On August 27, 1891, the cause was brought to trial, and the respective parties introduced evidence touching the issues; and the court made written findings in favor of plaintiff, upon which it based the following interlocutory decree: "Wherefore, by reason of the law and the finding aforesaid, it is ordered and adjudged that the said defendants, John Roberts and George L. Mesnager, executors of the last will and testament of Miguel Leonis, deceased, do, within twenty (20) days after the filing of this decree, render to this court in this action a full, just and true account of the property received by the said Miguel Leonis in his lifetime, as executor of the estate of Jean Leonis, deceased, and particularly of the sum of two thousand dollars (\$2,000), with interest thereon from the 19th day of March, 1888, at the rate of 7 per cent per annum, received by the said Miguel Leonis as such executor of the estate of Jean Leonis, deceased, and that said defendants do, in said account, justly, fully and truly account for all the dealings of the said Miguel Leonis, deceased, with the estate and property of the said Jean Leonis, deceased, including such items as may be claimed by the said defendants to have been paid out by the said Miguel Leonis, as such executor aforesaid, as expenses of administration, and for claims allowed and proven by creditors against the estate of the said Jean Leonis, deceased. It is further ordered, adjudged and decreed that when said account is filed as herein

ordered and adjudged, that a day shall thereupon be set in this court for the hearing of the same, and that thereupon the said defendants shall fully, justly and truly account to the said plaintiff for all of said property and matters aforesaid, and a settlement of said account be then had in this court, and that thereupon and thereafter a final decree shall be entered herein." The defendants have appealed from this interlocutory decree, and also from an order denying their motion for a new trial.

The appeal from the interlocutory decree should be dismissed; for, conceding that the decree was appealable (which is, at least, questionable), the appeal was not taken within a year after entry of the decree.

The appeal from the order denying a new trial was taken in time, but the only point made by appellants on this appeal is that the evidence is insufficient to justify that part of the sixth finding, "that there came to the possession of the said Miguel Leonis, as such executor aforesaid, and while he was acting as such," \$2,000 in money, "bearing interest," which was then and there "the property of the estate of said Jean Leonis," and that said Miguel never rendered any account thereof to the probate court. But, waiving the question whether a motion for new trial was proper before final judgment, which has not been raised (*Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 394), I think this finding is justified by the evidence. In his petition for probate of the will, Miguel stated that a part of the estate left by Jean was \$2,000, at interest, "in the hands of Miguel Leonis," and it appears that Miguel died without having rendered any account to the probate court.

The court found, as a conclusion of law, that the action "is not barred by the provisions of section 1493 of the Code of Civil Procedure." Conceding this to be a sufficient finding of the fact or facts constituting the alleged bar, notwithstanding it purports to be a conclusion of law, yet there is no specification in the statement on motion for new trial that it is not justified by the evidence, nor do counsel for appellant make the point that it is not sustained by the evidence. Therefore, the question whether it is justified as a finding of fact cannot be considered. Nor can the question whether it is supported, as a conclusion of law, by the findings of fact, be

considered on the appeal from the order: *Jenkins v. Frink*, 30 Cal. 595, 87 Am. Dec. 134; *Mason v. Austin*, 46 Cal. 386; *Thompson v. Patterson*, 54 Cal. 542; *Roberts v. Eldred*, 73 Cal. 398, 15 Pac. 16. And it has been held, even, that the error of rendering a judgment on an insufficient complaint cannot be corrected on appeal from an order denying a new trial: *Heilbron v. Ditch Co.*, 76 Cal. 8, 17 Pac. 932; *Shepard v. McNeil*, 38 Cal. 74. I think the appeal from the interlocutory order should be dismissed and that the order denying a new trial should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion, it is ordered that the appeal from the interlocutory order be dismissed and the order denying a new trial be affirmed.

SMITH v. ELLIS et al.*

No. 19,294; February 6, 1894.

35 Pac. 764.

Fraudulent Conveyances — Contradictory Evidence — Appeal.—

The mere fact that the parties to a conveyance contradict each other in some particulars will not warrant a reversal of the trial court's finding that the conveyance was not fraudulent.

APPEAL from Superior Court, Orange County; J. W. Towner, Judge.

Action by W. A. Smith against M. E. Ellis and J. N. Ellis, Sr., to subject certain land to the payment of judgments. Judgment for defendants. Plaintiff appeals. Affirmed.

J. T. Houx for appellant; J. W. Ballard for respondents.

SEARLS, C.—This is an action on the part of a judgment creditor of J. N. Ellis, Sr., to set aside as fraudulent a deed of conveyance of certain land in the county of Orange, exe-

*For subsequent opinion in bank, see 103 Cal. 294, 37 Pac. 400.

cuted by said J. N. Ellis, Sr., May 22, 1890, to his daughter M. E. Ellis, and to satisfy plaintiff's judgments out of said land. The defendants had judgment, from which, and from an order denying a new trial, as well as from an order denying a motion of plaintiff to amend his statement on motion for a new trial by inserting therein specifications as to insufficiency of evidence, etc., plaintiff appeals. For the purpose of disposing of the appeal, I shall assume the motion to amend the specifications of the insufficiency of the evidence as having been in fact allowed by the court. The testimony in the case was mainly that of the two defendants, father and daughter, and the two brothers of the latter, and the only question of any importance is, Was it sufficient to support the findings? This question can be answered in this wise: If true, it was amply sufficient. There is sufficient contradiction in the testimony of the two defendants to awaken some suspicion as to their truthfulness in my mind. These contradictions may, however, arise largely from ignorance on the part of the witnesses, from a failure to comprehend questions, from forgetfulness, etc., and a judgment formed from an examination of the record cannot, in the very nature of things, be as satisfactory as one based upon a hearing of the witnesses in open court with ample opportunity to not only hear what they say, but to observe their manner, intelligence, apparent honesty, etc. With all these superior opportunities the court below evidently placed faith in their integrity, and by its findings negatived all the charges of fraud. The findings are amply sufficient to support the judgment. I recommend that the judgment and orders appealed from be affirmed.

We concur: Vanelief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

BURR v. NAVARRO MILL CO.

No. 15,576; February 13, 1894.

35 Pac. 990.

Appeal—Delay in Filing—Dismissal.—An appeal not filed within the time prescribed by court rules will be dismissed, no good cause for the delay being shown, though no notice of the motion to dismiss was served on appellant's assignee in insolvency, he having, however, knowledge of the notice served on appellant's attorneys.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by Maggie E. Burr against the Navarro Mill Company. Judgment for plaintiff. Defendant appeals. Appeal dismissed.

Young & Powers for appellant; A. Morgenthal for respondent.

PER CURIAM.—Respondent moved to dismiss the appeal upon the ground that it was not filed within the time prescribed by the rules of the court. It is apparent from the certificate of the clerk of the lower court that such is the fact, and the appeal must be dismissed, unless good cause for the delay appears.

The action is one for personal injuries, and a judgment was entered upon the verdict of the jury for the sum of \$1,000 in favor of plaintiff. Subsequently defendant appealed the case to this court, and gave a bond with two sureties, staying execution upon the judgment. After the appeal was perfected and the stay bond given, the defendant was adjudged an insolvent debtor, an assignee was appointed, and an order made by the court staying all proceedings against the insolvent. Thereafter, upon application of respondent, the order was modified to the extent of allowing the present action to be prosecuted to final judgment, for the purpose of fixing the liability of the sureties upon the aforesaid bond. The attorneys representing the defendant in the trial of the case and on the appeal thereof were regularly served with no-

tice of the motion to dismiss now under consideration, but counsel for the assignee was not served with the notice, and now comes before the court asking for a continuance of the hearing, and also, in effect, objecting to the consideration of the matter because of a failure to serve notice upon him. The continuance was denied at the time, and his presence in court at the hearing was indicative of the fact that he had actual notice of the proceeding, and neither he nor the defendant's attorneys of record in the case make any showing upon the merits of the motion. It is ordered that the appeal be dismissed.

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ROBINSON v. DUGAN.

No. 19,241; February 24, 1894.

35 Pac. 902.

Estate of Decedent.—In an Action Against the Estate of decedent, a brother of plaintiff, there was in evidence a paper in the handwriting of decedent, headed "S. R. [plaintiff] in Acct. with W. R., [decedent,] Cr.," reciting by cash a certain amount and by certain articles certain other amounts. A witness testified that he saw decedent hand plaintiff a paper like that in evidence, plaintiff having just before asked decedent what plaintiff had to show that decedent owed him. A witness testified that, on several occasions before and after decedent's death, plaintiff said that decedent did not owe anything. Held, that a finding that decedent was not, at the time of his death, indebted to plaintiff was justified by the evidence.

Estate of Decedent—Action Against on Claim.—There was no error in refusing to allow plaintiff to state that the paper introduced by him was in his possession at decedent's death, he having already been permitted to testify that the paper had been in his possession ever since decedent's death, which was, in effect, the same thing.

Estate of Decedent—Action on Claim—Witness.—Under Code of Civil Procedure, section 1880, subdivision 3, forbidding a party to an action on a claim against a decedent's estate to testify to facts occurring before decedent's death, plaintiff cannot testify that a paper showing a debt from decedent to him was unpaid at decedent's death.

Estate of Decedent—Action on Claim.—A Witness who had stated that plaintiff on several occasions said that decedent owed no debts was properly allowed to state that in those conversations plaintiff made no exception in favor of himself.

APPEAL from Superior Court, Santa Barbara County; W. B. Cope, Judge.

Action by S. G. Robinson against John R. Dugan, administrator of William Robinson, deceased. Judgment for defendant. Plaintiff appeals. Affirmed.

Eugene W. Squier for appellant; E. B. Hall and J. W. Taggart for respondent.

BELCHER, C.—The plaintiff brought this action to recover the sum of \$814.50 upon an account alleged to have been stated between himself and William Robinson, in October, 1891. William Robinson died intestate in March, 1892, leaving a small estate, and thereafter the defendant was duly appointed and qualified as administrator thereof. The usual notice to creditors was published, and within the time prescribed the plaintiff presented his claim to defendant as such administrator for allowance, and the same was allowed and approved for \$4.50 and disallowed as to the balance. The answer of defendant denied that at the time named, or at any other time, an account was stated, or settled, or agreed to, by or between the plaintiff and said intestate, or that the said estate was indebted to the plaintiff in any sum, other than the \$4.50, which was allowed; and averred that all and every indebtedness or liability on the part of said intestate to the plaintiff, except the said \$4.50, had been fully paid and discharged before the death of said intestate.

The case was tried by the court without a jury, and among other things it found: “(5) That there was no account stated as between the plaintiff and said deceased, and that said William Robinson, deceased, was not indebted to said plaintiff, and his estate is not liable to plaintiff in any sum or amount other than said \$4.50, approved and allowed by defendant as administrator, as aforesaid, and that none of the allegations contained in paragraph 1 of plaintiff’s complaint are true.”

And as conclusions of law from the facts the court found: “(1) That plaintiff is entitled to be paid, in due course of administration, the sum of \$4.50, approved and allowed by said defendant before the commencement of plaintiff’s action herein. (2) That defendant’s intestate, William Robinson,

deceased, was not at the time of his decease indebted to said plaintiff in any sum or amount other than said \$4.50. (3) That defendant is entitled to judgment," etc.

Judgment was accordingly entered that the plaintiff be paid, in due course of administration, the \$4.50 allowed him, and that his action be dismissed, and defendant recover his costs. From this judgment, and an order denying his motion for a new trial, the plaintiff appeals.

It is contended that the judgment should be reversed, because the finding above quoted was not justified by the evidence, and portions of it were inconsistent with other portions thereof, and because the court erred in making certain rulings on the admission of evidence. To show that an account was stated between himself and the decedent, plaintiff introduced in evidence a paper (marked "Plaintiff's Exhibit No. 1") which was proved to be in the handwriting of decedent, and was as follows:

"S. G. Robinson in Acct. with Wm. Robinson.

Cr.

By cash on settlement.....	\$560 00
By cash from McAllester.....	250 00
Fruit cans.....	75
Pasturage	1 75
Pasturage	2 00

\$814 50"

The plaintiff then called as a witness one McLaughlin, who testified that he knew the plaintiff and decedent in his lifetime; that decedent was sick in Santa Barbara, and went to San Francisco for medical treatment about the month of October, 1891. That, four or five days before he went, witness heard a conversation between him and the plaintiff in which he stated that if he did not get better he would never return to Santa Barbara. That plaintiff then said: "What have I to show that you owe me money?" That decedent then went to his house, and in about fifteen minutes returned and handed to plaintiff a paper which looked exactly like his exhibit No. 1, and that plaintiff said nothing, looked at the paper, and folded it up. "It was about as large as that [exhibit No. 1]. It was about as wide as that. I can't say how long it

was." "He didn't let me see the writing." "I was about as far from them as from here to the stove [across the courtroom]. I couldn't swear whether it was just as long as that or not." "It might have been twice as long as this. I couldn't tell." The plaintiff was then called as a witness, and was asked by his counsel: "Mr. Robinson, will you look at this paper [showing witness paper marked 'Plaintiff's Exhibit No. 1'], purporting to be an account stated, and state whether or not this paper was in your possession and unpaid at the time of your brother's death?" The question was objected to and the objection sustained, and thereupon the witness testified: "This paper [exhibit No. 1] has been in my possession ever since the death of William Robinson. The amount, \$814.50, has not been paid. None of it has been paid since the death of my brother." It was further proved that decedent stopped in San Francisco about three months, and then returned to Santa Barbara and remained there until he died. One Palmanteer was then called as witness for defendant, and, after stating that he was acquainted with the decedent in his lifetime and with the plaintiff, said: "I have had conversations with S. G. Robinson both before and since his brother's death. . . . The conversations were about William Robinson's affairs. I had a conversation with S. G. Robinson—I think it was the day before his brother's death—and, among other things, he told me that his brother had money in the bank and owed no debts. I also had some talk with S. G. Robinson a week or so after his brother's death in regard to his brother's affairs. . . . He stated that there were no debts. He said he had some money in bank. I think six or eight or ten hundred dollars." On cross-examination the witness testified: "I think I had eight or ten conversations with S. G. Robinson—some before and after his brother's death—in relation to settling up the estate. . . . He told me twice that his brother owed no debts when we were talking about the administration, and once when we were talking about a filly that his brother had given him. . . . He said that William Robinson was not a man that owed debts; he was not that kind of a man; he did not owe anything; something of that kind." And on redirect examination the witness was asked by counsel for defendant: "Did he [S. G. Robinson] ever, in any of those conversations, make any claim

that William Robinson owed him anything?" The question was objected to by counsel for plaintiff, and the objection overruled, and the witness then answered: "I never heard him." In rebuttal, the plaintiff testified: "I may have said to Mr. Palmanteer that William Robinson did not owe any debts, but I did not mean to include myself in it when I was speaking to him."

In view of this evidence—and there was more in the same line—it is not necessary to determine whether the paper introduced by the plaintiff constituted an account stated; for, conceding that it did, still the account may have been paid and discharged before the decedent's death. The only question, therefore, that need be decided is, Was the finding that "William Robinson, deceased, was not indebted to said plaintiff, and his estate is not liable to plaintiff, in any sum or amount other than said \$4.50," justified by the evidence? The question whether all indebtedness from decedent to the plaintiff, other than the \$4.50 allowed, had been paid, and whether there was any existing indebtedness on the part of the estate to plaintiff, was one of fact, to be passed upon by the trial court; and on this question the evidence introduced by the defendant raised, in our opinion, at least a substantial conflict. This being so, the finding cannot, under the well-settled rule of this court, be disturbed on appeal. The objection that portions of the finding quoted are inconsistent with other portions thereof is based upon the fact that, by his complaint, the plaintiff sought to recover only on an account stated; and it is said that the finding that no account was stated is wholly inconsistent with the further finding, in effect, that the estate was liable to plaintiff for the sum of \$4.50. But there was no issue as to the \$4.50. The complaint alleged that that sum was allowed to the plaintiff on presentation of his claim, and the answer admitted and alleged the same facts. We see no merit, therefore, in this objection.

The errors in law relied upon for a reversal of the judgment are: (1) The refusal of the court to permit the plaintiff to answer the question propounded to him as to whether or not the paper (exhibit No. 1) was in his possession and unpaid at the time of his brother's death; and (2) the overruling plaintiff's objection to the question asked of the witness Palmanteer, as to whether the plaintiff in any of the conversa-

tions related made any claim that William Robinson owed him anything. We see no error in either of the rulings complained of. When the plaintiff testified, as he did without objection, that the paper had been in his possession ever since the death of his brother, he in effect stated that it was in his possession at the time of his brother's death. The balance of the question, as to whether the account was then unpaid or not, was intended to elicit evidence which was clearly inadmissible under section 1880, subdivision 3, of the Code of Civil Procedure. The witness Palmanteer had stated that, in the conversations which he had had with the plaintiff, the latter had more than once said that his brother owed no debts—that he did not owe anything—and it was therefore entirely proper to ask him if, in any of those conversations, the plaintiff made any exceptions in favor of himself. The judgment and order appealed from should be affirmed.

We concur: Temple, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

TIBBETS v. BAKEWELL et al.

No. 19,162; February 24, 1894.

35 Pac. 1007.

Ejectment—Evidence—Sufficiency.—In Ejectment, in Which the answer denied ouster and the possession and withholding by defendants, it appeared that the land in dispute is a strip six feet wide, on which a water ditch is located. The evidence showed that defendants frequently put a pressure board in the ditch, which cut off plaintiff's water and diverted it into a flume made by them. Held, that the evidence established a trespass merely, and did not justify a judgment for plaintiff.

APPEAL from Superior Court, San Bernardino County; John C. Campbell, Judge.

Action in ejectment by Luther C. Tibbets against Thomas Bakewell and others. From a judgment for defendants, plaintiff appeals. **Affirmed.**

L. C. Tibbets and A. B. Paris for appellant; Frank O. Oster for respondents.

HAYNES, C.—Ejectment to recover a strip of land six feet in width. The complaint was in the usual form. The answer denied the seisin of plaintiff, and the ouster and the possession and withholding by the defendants. It appears from the evidence that a water ditch is located upon this strip of land, and that at some point of the land in question the water was diverted by the defendants to other land belonging to them. Plaintiff, after giving evidence tending to prove title, etc., testified: “I had ordered my water in said ditch, and had been using it. When I found I had been getting no water, I went up to the box to see what the trouble was; and I found a board put in and the water running into a flume that Thomas Bakewell and the Riverside Water Company had made. There was a pressure board put in, so that all of my water was shut off.” He further testified that this occurred about every time he had “gone to irrigate” since then. He also testified that he “had been damaged in the loss of the use of that strip of land, and by the prevention by the defendants of his running water on said land, in the sum of two hundred dollars.” Plaintiff having rested, defendant moved for judgment of nonsuit, which was granted; and this appeal is from that judgment and from an order denying a new trial.

It may be that the defendants have been guilty of a trespass, and have damaged the plaintiff by a diversion of water, or that they did something they ought not to have done, but the evidence is clearly insufficient to justify a judgment for plaintiff in an action of ejectment. The judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

DOOLEY v. SEVENTEEN THOUSAND FIVE HUNDRED
HEAD OF SHEEP.

No. 19,298; February 28, 1894.

35 Pac. 1011.

Animals.—Where a Trespass is Committed by the Animals of several persons, those of one person cannot be sold to pay the damages caused by animals of others, he not having any control over them, and not having contributed to the cause of their trespassing, and no authority for such sale being given by act of March 7, 1878, concerning trespassing of animals.¹

Animals—Trespass by.—A Finding That 7,000 Sheep, marked with certain brands, trod down and depastured all of plaintiff's lands, being 9,460 acres, comprising ten whole and twenty fractional sections, is not supported by evidence only that they were seen on five different days and on three sections of the land; there being evidence that other sheep were seen on the lands, and it not being shown that 7,000 other sheep did not trespass on the lands as alleged in the complaint.

APPEAL from Superior Court, San Luis Obispo County;
V. A. Gregg, Judge.

Action by Hiram A. Dooley against 17,500 head of sheep. Judgment for plaintiff. Gracian Solaberry appeals. Reversed.

Alvin Fay and Wilcoxon & Bouldin for appellant; Ruffin & Ruffin, Graves & Graves and L. Lamy for respondent.

VANCLIEF, C.—This action in rem was brought to recover \$7,500 damages, alleged to have been suffered by plaintiff in consequence of trespasses of the defendant sheep upon 9,460 acres of uninclosed lands of the plaintiff, situate in the county of San Luis Obispo; and is based upon an "Act concerning trespassing of animals upon private land in certain counties," approved March 7, 1878 (Stats. 1878, p. 176). It is alleged

¹ Cited and followed in *Pacific Livestock Co. v. Murray*, 45 Or. 109, 76 Pac. 1080, where it was said the defendant might show that other stock, including the plaintiff's, grazed on the land, the court adding, "He is liable only for the mischief done by his sheep, and not for that done by animals belonging to other parties."

in the complaint that the defendant sheep are marked or branded as follows: 3,500 of them, J H; 3,500, J O; 3,500, A A; 3,500 P; and 3,500, Δ ; and that the owners of the defendant sheep are unknown to plaintiff. The trespasses are alleged to have been committed at divers times between December 1, 1892, and March 6, 1893.

The action was commenced March 13, 1893, and on the same day a writ of attachment was issued to the sheriff of Kern county (which is not one of the counties to which the act applies), commanding that sheriff to attach all the sheep above described, "or so much thereof as may be sufficient to satisfy the plaintiff's demand as above mentioned," unless the owners give security, etc. A summons directed to the defendant animals was also issued, and served by posting a copy thereof on the courthouse door from March 13th until March 24th. On March 24th the sheriff of Kern county attached 3,000 of the defendant sheep, 1,500 of which were marked J O, and 1,500 marked Δ , by seizing them and placing them in the hands of a keeper. On March 29, 1893, the owner of the sheep attached appeared by attorney and demurred to the complaint; and, the demurrer being overruled, the defendant answered, denying all the material averments of the complaint. The court found the alleged trespasses to have been committed by the following sheep: "About 2,500 sheep branded A A, and about 2,000 head of sheep branded J O, and about 2,500 sheep branded Δ (triangle), by treading down and depasturing all of said lands, and the grass and herbage thereon growing. That the value of said grass and herbage so destroyed was and is twenty cents per acre for each and every acre of said land, and the plaintiff was thereby damaged by the said destruction of said grass and herbage in said sum of \$1,892." And also found that Gracian Solaberry was the owner of about 2,000 of the sheep branded J O, and about 2,500 of those branded Δ (triangle), including the 3,000 attached by the sheriff of Kern county. At the close of the evidence, upon motion of plaintiff, the action was dismissed as against the 3,500 sheep branded P, and the 3,500 branded J H. It was thereupon "ordered and adjudged that there is due the plaintiff, as found by the court, the sum of \$1,892 damages, and costs of suit," and "further ordered and adjudged that the defendant sheep levied on and held in at-

tachment in this case, to wit, about 1,500 head branded J O, and about 1,500 head branded \triangle (triangle), be sold according to law, in the usual course of sales of property under execution; that the proceeds of sale be applied to the payment of the expenses of sale and the amount due the plaintiff, with his costs and accruing interest; and, if any surplus remains after said payments, the same to be paid to Gracian Solaberry, the owner of said brands of sheep. If said sales do not produce enough to satisfy the amount due plaintiff, that then those certain sheep defendants, about 2,500 head (owner unknown), branded A A, be sold to pay the balance due plaintiff, and expenses of sale. If any surplus arises upon said last sale, the same shall be paid into court for the unknown owner of said sheep branded A A." From this judgment, and from an order denying his motion for a new trial, Gracian Solaberry appeals.

1. On the appeal from the judgment, it is contended by appellant that the findings of fact do not warrant the conclusions of law nor support the judgment. It is found as a fact that the trespasses, for which damages in the sum of \$1,892 are found to have been suffered by plaintiff, were committed by 4,500 sheep, the property of appellant, Solaberry, and 2,500 sheep marked A A, of which Solaberry was not the owner, and whose owner was unknown, and of which the court had acquired no jurisdiction by attachment or distraint; yet the judgment is that the 3,000 of Solaberry's sheep which were attached be sold, and that the proceeds of such sale be applied to the payment of all the damages and costs, if sufficient to pay all. I think this was not warranted by the facts found. The act of the legislature under which this action is prosecuted, however unique in some respects, does not expressly, nor by necessary implication, authorize the taking or sale of one man's animals to pay the damages caused by trespasses of animals owned by others, over which animals he had no control. It does not appear that Solaberry had any control of the sheep marked A A, nor that in any way or degree he contributed to the cause of their trespassing upon plaintiff's land. Therefore Solaberry was only severally liable for the damages caused by his sheep, and such damages should have been distinctly found.

2. Appellant contends that the evidence is insufficient to justify the finding that the damage caused by the trespasses of 2,500 sheep branded A A, 2,000 branded J O, and 2,500 branded Δ , "was 20 cents per acre for each and every acre" of the land described in the complaint (9,460 acres), or the finding that plaintiff was thereby damaged in the sum of \$1,892 by the trespasses of the sheep last above mentioned. I think this point well taken. None of these sheep were seen on any part of plaintiff's lands, except on five different days, and only in three different sections of it; and no two of the bands differently branded were ever seen together on said land. Plaintiff testified that he first saw about 2,500 of the sheep branded A A on section 18, February 16, 1893, and on the same day saw about 2,500 branded J O on section 12. About five days thereafter he saw about 2,500 of the triangle band on section 12; and that these were all the times he saw the sheep on his land. Swain testified that on January 22d or 23d he saw about 2,000 sheep, branded J O, on section 18, and on March 3d saw about 2,500, branded Δ , on section 34. Abbott testified that on March 3d or 4th he saw the triangle sheep on plaintiff's land, but did not know what section they were on; about the same time he saw two or three other bands of 2,000 to 2,500 each, but did not see the brands of these. The sheep he saw at different times were three miles apart. On March 3d, Morris saw about 2,000 triangle brand on the land near the line of Kern county, in care of a herder, who drove them across the line into Kern county. The evidence as to damage consisted of the testimony of the witnesses above named, who testified as experts as to the damage done to the pasturage on the whole of plaintiff's land, without regard to the animals by which the damage had been caused, except as above stated. They rode over and examined all the land, between the first and tenth days of March, 1893, and testified that all the grass and herbage had been eaten, and the land trodden, apparently by sheep, in consequence of which they estimated the damage at twenty cents per acre of all the land; but there was no evidence, except that above stated, that the damage was caused by appellant's sheep, or by the sheep branded A A. On the contrary, other bands of sheep had been seen on the lands by some of the same witnesses. Plaintiff's land (9,460 acres) is composed of ten whole sections and

about twenty subdivisions of other sections, all situate in townships 31 and 32, and amounts to nearly fifteen sections, which, if located in a square form, would be nearly four miles square; but they are not so located, and the descriptions given in the complaint show that in some directions they must extend at least six miles.

It is alleged in the complaint that the damage was done by five different bands of sheep, two of which were branded, respectively, J H and P; and there is nothing in the evidence tending to prove that these two bands of 3,500 each did not trespass upon plaintiff's lands at the times and in the manner alleged. The evidence that appellant's sheep and the A A sheep were seen on small portions of the land, on four or five different days, is perfectly consistent with this allegation of the complaint, and is obviously insufficient to justify the finding that appellant's sheep and the sheep branded A A damaged "each and every acre" of plaintiff's lands to the extent of twenty cents, even though each and every acre had been so damaged by sheep. I think the order and judgment should be reversed and the cause remanded for a new trial.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be reversed and the cause remanded for a new trial.

BOEHM v. GIBSON.

No. 19,285; February 28, 1894.

35 Pac. 1014.

Trial—Absence of Attorney.—The Court Waited Several Hours for plaintiff's attorney to conclude the trial of another case in another department of the same court, with the understanding that the trial of the case against defendant would then proceed. At the conclusion of such trial such attorney did not appear, but engaged in the trial of habeas corpus proceedings, which he commenced two days before, and treated a notice by defendant that the trial of his case would

proceed with profane contempt. Held, that a trial of such case in the absence of such attorney was proper, plaintiff being present and offered an opportunity to introduce his evidence.

Appeal Taken for Delay—Damages for Being Deprived of Property.—Where, in an action to recover personal property, it appears that an appeal by plaintiff is without merit, and was taken for delay, and that defendant has been deprived of the use of such property for more than a year, the latter will be awarded \$200 damages in addition to his costs.

APPEAL from Superior Court, Los Angeles County; William P. Wade, Judge.

Action by William Boehm against E. D. Gibson to recover possession of certain personal property. From a judgment for defendant and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

H. H. Appel and G. D. Blake for appellant; James Burdett and W. E. Arthur for respondent.

VANCLIEF, C.—Action to recover the possession of specific articles of personal property, or the value thereof, alleged to have been wrongfully taken and withheld from the plaintiff by the defendant. The defendant is sheriff of Los Angeles county, and justifies the taking under a writ of attachment against one William Shoulderer. The judgment of the court was in favor of the defendant, from which, and from an order denying his motion for a new trial, the plaintiff has appealed. Appellant makes no point on the appeal from the judgment; and the only grounds upon which a new trial is asked are (1) irregularity in the proceedings of the court; and (2) accident and surprise which ordinary prudence could not have guarded against. The affidavits upon which the motion was made and opposed occupy thirty-four pages of the printed transcript, and, without much conflict, are to the following effect: The case was first set for trial on December 9, 1892. when defendant, with his counsel and witnesses, was in attendance and ready for trial; but, on account of other business having precedence, the trial was postponed from day to day until December 15th, when it was called for trial, defendant, with his witnesses and counsel, then being present in court and ready for trial, but neither plaintiff nor his counsel was

present. After waiting about an hour, it was ascertained that plaintiff's attorney was engaged in the trial of another case in another department of the court; whereupon defendant's attorney reluctantly consented that the trial should be postponed, and, by agreement of counsel, the case was reset for trial on January 13, 1893, at 10 o'clock A. M., at which hour the defendant, with his witnesses and counsel, again appeared and was ready for trial, when the attorney for plaintiff stated to the court that he was then engaged in the trial of another case in another department (No. 5) of the same court, which trial had been commenced on January 12th, but that such trial would probably be closed by 12 o'clock M. Thereupon the court, with consent of defendant's counsel, appointed 2 o'clock P. M. as the time for the commencement of the trial, at which time the defendant was again present and ready for trial; but, plaintiff's counsel failing to appear, the court, after waiting about half an hour, dispatched a messenger to department No. 5 (in the same building) to ascertain whether plaintiff's attorney was still engaged in that department. Shortly afterward plaintiff's attorney appeared and said he was still engaged in department No. 5, but would probably be through by 3 o'clock P. M., when he would immediately proceed with the trial of this case. Shortly thereafter defendant's attorney (Mr. Burdett), as stated in his affidavit, went to department No. 5, and there awaited the termination of the trial in which plaintiff's attorney (Mr. Appel) was engaged; and when it terminated, about 3 o'clock P. M., and department No. 5 had adjourned, Mr. Burdett requested Mr. Appel to commence the trial of this case, and was then, for the first time, told by Mr. Appel that he was about to enter upon the argument of a habeas corpus case in department No. 2, for the purpose of obtaining the discharge of one of his clients from imprisonment for contempt of court, and that he did not know how long he would be thus engaged. Thereupon Mr. Burdett returned to department No. 3, in which this case was pending, and reported to the court that the trial of the case in department No. 5, in which Mr. Appel had been engaged, had been closed, and what Mr. Appel had said about engaging in the habeas corpus proceeding, and asked the court (No. 3) to proceed with the trial of this case; but the court refused to proceed immediately, saying it would

wait a few minutes longer. Mr. Burdett then went to department No. 2, where he found Mr. Appel's partner (Mr. Kinley) arguing the habeas corpus case, and Mr. Appel in his seat listening to the argument. Mr. Burdett then again requested Mr. Appel to go to department No. 3, and proceed with the trial of this case, and notified him that, unless he did so, Mr. Burdett would insist that the court proceed with the trial, to which Mr. Appel answered that "he did not care what was done; that he would not leave that case" (the habeas corpus case). While Mr. Appel, in his affidavit, does not deny having said "he did not care what was done," he states that he "never consented to the judgment being entered, or said anything indicating that said Burdett should go on with the trial," but admits that he said to Mr. Burdett: "Don't bother me. You be d——d"—which language is not stated in Mr. Burdett's affidavit. Immediately after this conversation in department No. 2, Mr. Burdett returned to department No. 3, and informed the judge thereof of what Mr. Appel said, and what he was doing in the habeas corpus case, and insisted that the court proceed with the trial of this case; and thereupon the court ordered the parties to proceed with the trial of this case, the plaintiff then being present in court. No doubt Mr. Appel was immediately informed of this order, as he was then in the same building and not more than one hundred and fifty feet distant from the courtroom in which the order was made; yet neither he nor anyone for him appeared therein or objected to the trial in his absence. Nor does it appear that plaintiff objected, though present. The court then informed plaintiff that it would hear any evidence he desired to offer, and that he was at liberty to testify in his own behalf, but he declined to testify or to offer any evidence whatever. The evidence on the part of defendant was then introduced, but no evidence was offered by plaintiff in rebuttal. Thereupon judgment was rendered for defendant.

Counsel for appellant contends that the trial of this case was commenced in his absence, contrary to an agreement and understanding between him and counsel for defendant, assented to by the court, to the effect that the trial was not to be commenced until the close of the trial in which he was engaged in department No. 5, and further contends that the trial of the habeas corpus case in department No. 2 was a continu-

ation of the trial in which he had been engaged in department No. 5. But the affidavits do not support either of these contentions. He had said nothing about the habeas corpus proceeding to defendant's attorney or to the court (department 3) until after the close of the trial of the civil action, when he first spoke of it to Mr. Burdett, as above stated. Indeed, he had petitioned for the writ of habeas corpus after the agreement to proceed with the trial of this case as soon as the trial of the civil case should be closed, though his client had been imprisoned the day before, while his partner was trying the civil case in his absence. Surely the habeas corpus proceeding which he commenced in the afternoon of that day (January 13th) was no part of the civil case on account of which the delay of the trial of this case had been consented to at his request. Considering all the circumstances, I think the conduct of plaintiff's attorney not only manifested a want of proper respect for the court, but plainly indicated his intention to subordinate the business of the court and the rights of suitors therein to his own business and convenience. If, upon the close of the trial of his civil case, he deemed it of great importance to himself or client to enter upon the trial of the habeas corpus case, a proper respect for the court, that had been waiting for him several hours at his request and solely for his accommodation, should have induced him to go to that court and render his excuse, and ask for such further delay as he desired, or for a continuance; but he did nothing of the kind. Nor did he even ask opposing counsel for further time, but, according to his own affidavit, did ask him to "be d——d." There is no evidence of accident or surprise nor of irregularity in the proceedings of the court to the prejudice of appellant: *Barnes v. Barnes*, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298; *Baumberger v. Arff*, 96 Cal. 261, 31 Pac. 53. I think the judgment and order should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed; and as the appeal was evidently taken for delay and is without merit, and by reason thereof the respondent has been deprived of the use of the property sued for for more than a year, the sum of \$200 damages is awarded to the respondent in addition to his costs upon appeal.

DECKER v. PERRY.

No. 19,266; February 28, 1894.

35 Pac. 1017.

Irrigation District.—A Complaint Against an Irrigation District Officer alleged that such proceedings had been had before the board of supervisors that said board declared the district duly organized. Held, no averment that the district was incorporated, as provided by act of March 7, 1887, since it did not show the jurisdiction of the board, or an election held, or that its declaration "was duly given or made," or that a copy of the order had been filed for record.

Irrigation District — Assessment. — A Complaint to Recover Money Paid on a public assessment must show the nature of the proceedings to collect it, the threat of which constituted the compulsion.

Irrigation District—Assessment.—Where Thirty-three Days must have Elapsed, after plaintiff paid the assessment, before the three weeks' advertisement of sale of his land therefor could have begun (Stats. 1891, p. 245), and he does not allege that any sale had been already advertised or otherwise threatened when he paid, he fails to show any intention to sell it such as would make his payment involuntary.

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action by Uri Decker against Wesley Perry for money had and received. Demurrer to complaint overruled and judgment for plaintiff. Defendant appeals. Reversed.

C. H. Rippey for appellant; D. L. Murdock for respondent.

VANCLIEF, C.—The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and, upon failure of defendant to answer, judgment was rendered in favor of the plaintiff. This appeal is from the judgment on the judgment-roll, and presents the question whether or not the demurrer was properly overruled.

The object of the action is to recover from the defendant \$5.02, alleged to have been unlawfully assessed to plaintiff on his land by the "Otay Irrigation District," and paid by plain-

tiff to defendant under protest, to prevent plaintiff's land from being sold by the defendant as collector of said district. It is averred in the complaint "that, on December 7, 1891, such proceedings were had before the board of supervisors of San Diego county, state of California, that the said board of supervisors declared the Otay Irrigation District duly organized under the name and style of 'Otay Irrigation District,' and declared" five persons—Funk, Modie, Jordan, Spence and Merriam—elected as directors of said district, and since that time said persons have been acting as such directors; and that Charles Sanborn is acting as secretary of said board, and the defendant, Wesley Perry, is acting as collector of said Otay Irrigation District. That said board of directors have voted to themselves salaries and fees amounting to about \$2,600, and claim to have contracted indebtedness against said district for other purposes, amounting to nearly \$3,500. That on October 4, 1892, said board passed a resolution declaring that it was necessary, for the purpose of defraying the expenses of the organization of the district, including salaries of officers and employees, to raise the sum of \$9,179.62; and, by a further resolution, ordered an assessment levied on the assessable property of said district of \$9,179.62; and, by a further resolution, fixed the rate of assessment at ninety cents upon \$100 valuation of the assessable property of said district. That said board never submitted to the electors of said district, at any election, the question as to whether or not an assessment of \$9,179.62 should be levied, nor did said electors ever vote for any bonds, or to incur any indebtedness upon said district. That, after the levying of said assessment, the defendant, as collector of said district, received from the secretary of the board the assessment-books of said district, in which were entered said assessment against the property within said district, among which was five acres of land, the property of plaintiff, on which was assessed the sum of \$4.78; and thereafter the defendant caused to be published in a newspaper published in said district a notice stating "that said assessment was due and payable, and would become delinquent at 6 o'clock P. M., on the last Monday of December, 1892, and that, unless paid prior thereto, five per cent would be added." That, on December 29th (after the last Monday in December), "the plaintiff, to prevent his above-

described property from being sold by the defendant as collector of said district, paid to the defendant said assessment of \$4.78, together with twenty-five cents penalty, which sum was paid under protest made in writing and delivered to defendant at the time of such payment." A copy of the protest, with the defendant's acknowledgment of the receipt thereof, dated December 29, 1892, is attached to the complaint as an exhibit. The only ground of the protest is that no election had been called or had at which the question whether the assessment should be levied was, or could have been, submitted to the electors of the district.

It is contended for appellant that the payment of the assessment by the plaintiff was voluntary, and not induced by duress or coercion, and, therefore, that he is not entitled to recover it back; and the record seems to support this view. "The illegality of the demand paid constitutes of itself no ground for relief. There must be in addition some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment": *Brumagim v. Tillinghast*, 18 Cal. 266, 79 Am. Dec. 76; *Garrison v. Tillinghast*, 18 Cal. 407. The complaint shows that the assessment was paid to defendant while acting as the agent or officer (collector) of an undefined association under the name and style of "Otay Irrigation District," operating through five directors, a secretary, and collector, but the kind or nature of whose business is not stated. Respondent's counsel claims in his brief, however, that the Otay Irrigation District is a corporation organized under the act of the legislature entitled, "An act to provide for the organization and government of irrigation districts," etc., approved March 7, 1887, known as the "Wright Act" (Stats. 1887, p. 29), and amendments thereof; but this fact is not averred in the complaint. The bare averment that "said board of supervisors declared the Otay Irrigation District duly organized" is not an averment of the facts or acts required by said act of the legislature to confer jurisdiction on the board of supervisors, or to constitute an organization of an irrigation district under that act. Nor is it an averment that an order, resolution, or "declaration" of the board to that effect had been "duly given or made," as required by section 456 of the Code of Civil Procedure: *Judah v. Fredericks*, 57 Cal. 391. The averment that the board declared the district

“duly organized” is substantially and essentially different from an averment that the board duly declared the district organized. But, even if the averment had been that the board duly declared the district organized, it would not have shown a completed organization. The law requires, as a prerequisite to a complete organization, that an election be held at which two-thirds of the votes cast shall be in favor of organizing the district; and section 3 of the act provides: “The said board of supervisors shall meet on the second Monday succeeding such election and proceed to canvass the votes cast thereat; and if upon such canvass it appear that at least two-thirds of all the votes cast are ‘Irrigation District—Yes,’ the said board shall, by order entered on their minutes, declare such territory duly organized as an irrigation district under the name and style theretofore designated, and shall declare the persons receiving respectively the highest number of votes for such several offices to be duly elected to such offices. Said board shall cause a copy of such order, duly certified, to be immediately filed for record in the office of the county recorder, . . . and from and after the date of such filing the organization of such district shall be complete, and the officers thereof shall be entitled to enter immediately upon the duties of their respective offices.” There being no averment that the board, duly or otherwise, caused a copy of its order declaring the district organized to be filed for record, the complaint fails to show that the organization of the district as a corporation was ever completed. Then, again, the complaint fails to show that the defendant threatened or intended to sell plaintiff’s land, or any land within the alleged district. All that is alleged is that defendant published a notice “that said assessment was due and payable, and would become delinquent at 6 o’clock P. M. on the last Monday (26th) of December, 1892, and that unless paid prior thereto, five per cent would be added.” No demand for payment other than such as may be implied in that notice appears to have been made. The compulsion or coercion which is sufficient to render a payment involuntary “must come from the party to whom or by whose direction the payment is made, and arise from the exercise or threatened exercise of some power possessed, or supposed to be possessed, by him over the person or property of the party making the payment”: *Garrison v. Tillinghast*, 18 Cal. 407. The com-

plaint fails to show that the defendant to whom the assessment was paid possessed any power over the person or property of the plaintiff, or any reason for supposing he possessed such power; nor is it pretended that defendant had, or was supposed to have, any power over the person of the plaintiff, it being claimed only that defendant, as collector of the Otay Irrigation District, whatever that may be, had, or was supposed to have, power to sell plaintiff's land to pay assessments levied thereon by the directors of said irrigation district. But, since the complaint fails to show that the Otay Irrigation District was ever organized as a corporation according to any law, it fails to show any reason for the alleged supposition that the officers or agents of that district had power either to levy assessments on or to sell plaintiff's land. It is suggested, however, by counsel for appellant that the Otay Irrigation District is shown at least to be a de facto corporation, but this suggestion finds no support in the complaint; there being no averment that it or its officers ever claimed to be a corporation, or acted as such, or that plaintiff ever dealt with or recognized it as a corporation. All of the alleged acts of its officers or agents may have been lawfully done by an unincorporated association having no power to enforce payment of assessments by the sale of property of its members. But conceding, for the sake of argument, that the Otay Irrigation District was duly organized according to the Wright act, yet it does not appear that such pressure for payment was put upon plaintiff as would constitute duress or coercion in the legal sense. No sale of his land had been advertised or otherwise threatened before he paid the assessment; and thirty-three days must have elapsed, after he paid, before a notice of sale of his land could have been published, and no sale could have been made until after three weeks' publication of such notice: See sections 24 and 25, the act as amended, Stats. 1891, p. 245. For aught that appears in the complaint, there may have been no intention to sell his land.

Counsel have cited no case in this state, and I have found none, in which the money paid on an alleged tax or assessment has been recovered back when no seizure of property of the plaintiff had been made, and no sale thereof advertised or otherwise threatened. In addition to the cases above cited the following are more or less in point: *De Baker v. Carillo*,

52 Cal. 473; Bank v. Chalfant, 52 Cal. 170; Bank v. Webber, 52 Cal. 73; Bank v. Chalfant, 51 Cal. 369; De Fremery v. Austin, 53 Cal. 381; Meek v. McClure, 49 Cal. 623; Guy v. Washburn, 23 Cal. 111; Dear v. Varnum, 80 Cal. 87, 22 Pac. 76.

For all purposes of this appeal, it is assumed, without deciding, that the assessment may have been illegal because not authorized by vote of the electors of the district, as held in Tregea v. Owens, 94 Cal. 317, 29 Pac. 643, which case authoritatively construes the act of March 7, 1887, as originally passed, in relation to the power of the directors to levy assessments of the nature of that in question here, and is applicable to this case, unless that act has been changed, in respect to such powers of the directors, by the amendments thereof in 1891. I think the judgment should be reversed and the court below directed to sustain the demurrer.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is reversed and the court below directed to sustain the demurrer.

PEOPLE v. CLEMENT.

No. 21,031; February 28, 1894.

35 Pac. 1022.

Information—Duplicity—Amendment.—An Information Which Charges Two offenses is demurrable, and cannot be amended after the taking of defendant's plea, without a new arraignment and plea to the amended information.¹

Information—Duplicity.—A Defendant Who has Demurred to an information as charging two offenses does not waive his right to move in arrest of judgment by moving for a new trial.

¹ Cited in People v. Danford, 14 Cal. App. 449, 112 Pac. 478, and held there not to be any longer authority, "for the reason that section 954 of Penal Code, as it stood prior to the amendment of 1905, provides that the information should charge but one offense."

APPEAL from Superior Court, Los Angeles County; J. W. McKinley, Judge.

C. H. Clement was convicted of an attempt to commit grand larceny. From an order in arrest of judgment, the people appeal. Affirmed.

H. C. Dillon, district attorney, and Attorney General Hart for the people; W. T. Williams for respondent.

HAYNES, C.—The people appeal from an order in arrest of judgment. The information contained two counts—the first, for the larceny of a horse, buggy, and harness, and the second count charging an embezzlement of the same property. The defendant demurred to the information upon the ground that it charged more than one offense. The demurrer was overruled and a plea of not guilty entered. After all the evidence had been introduced, and during the argument of the case to the jury, the district attorney, with the consent of the court and without objection from the defendant withdrew the count charging embezzlement, and the jury found defendant “guilty of attempt to commit grand larceny.” The defendant moved for a new trial and his motion was denied. He then moved in arrest of judgment, upon the ground stated in his demurrer, and, this motion being sustained, the people appeal.

That two distinct offenses are charged in the information has been decided by this court in at least two cases where the facts were the same as here: See *People v. De Coursey*, 61 Cal. 134, and *People v. Quvis*, 56 Cal. 396. But appellant contends that the duplicity was cured by withdrawing the count charging embezzlement, and we are cited to authorities to show that the duplicity may be cured: (1) by verdict of guilty on one count and not guilty on the other; (2) by a *nolle prosequi* as to one count; (3) by taking a verdict on one count only; and (4) by election by the prosecuting officer as to which count he will proceed upon. These authorities, however, are under the old procedure, which permitted several counts, and where, upon the face of the indictment, each count charged a distinct offense. But under that procedure the defendant was required to plead to each count, and thus a dis-

inct issue was made upon each, and the jury were required to find on each count as to which there was a plea of not guilty; and, while the district attorney might enter a nolle as to one or more counts, if this were done after the jury was sworn, unless the defendant consented, it was a bar to a further or new prosecution for the offense charged in such count. This, however, did not affect the issues upon other counts; but here the information was framed upon the theory that but one offense was charged, and it was upon that theory that the demurrer was overruled and a single plea of not guilty taken. As the defendant could not be required to plead to two offenses charged in the same information, it cannot be said that issue was joined as to either offense, and withdrawing one of the counts, after the plea, could not cure the defect; for, even if it be conceded that there was a plea to one offense, it could not be said that it applied to one of the offenses rather than the other. If the demurrer had been sustained, as it should have been, and the district attorney had then taken leave to amend by striking out the second count, and the plea had been taken as to the first, the defect would have been cured. The information being bad, under the statute, it could not be amended after the defendant's plea was taken, without a new arraignment and plea to the amended information.

It is further contended by appellant that, by moving for a new trial, the defendant waived his right to move in arrest of judgment. This contention cannot be sustained. At common law, it was matter of right, and might be made at any time after conviction and before sentence: 1 Bishop on Criminal Procedure, secs. 1283, 1284. Our Penal Code makes but one restriction. If the defendant failed to demur to the information, he waived his right to move in arrest upon any of the grounds mentioned in section 1004: See Pen. Code, sec. 1185. Like a complaint in a civil case, which states no cause of action, a fatal defect in an indictment may be taken advantage of at any stage of the proceeding, unless the right to do so is restricted by the Penal Code. The code, as well as the common law, permits this motion after a plea of guilty, and even authorizes the court to arrest the judgment on its own view of any of the defects specified in the code without motion: Pen. Code, sec. 1186. We know of no case which sustains appellant's contention. 12 American and English

Encyclopedia of Law, page 147i, cited by appellant, expressly states that "the motion may be made after the decision of of a motion for a new trial," though the two cases cited by the author to this proposition were civil cases. The motion in arrest of judgment was properly sustained, and the order appealed from should be affirmed.

We concur: Vancief, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the order appealed from is affirmed.

SAINSEVAIN v. LUCE et al.

No. 19,274; February 28, 1894.

35 Pac. 1033.

Guardian—Suit on Note in His Own Name.—Though the code provides that a guardian must sue in the name of his ward, a payee of a note who is described as "guardian" may sue in his own name, in the absence of evidence of a ward or trust estate.

Mortgage—Attorney Fees.—Where a Mortgage Secures in terms only the principal and interest of a note, a lien cannot be had for attorneys' fees, though the note provides for them.

APPEAL from Superior Court, San Diego County; W. L. Pierce, Judge.

Action by Paul Sainsevain against M. A. Luce, C. S. Luce and Olive B. Montania to foreclose a mortgage. Judgment for plaintiff, and defendants appeal. Modified.

Luce & McDonald for appellants; Sweet, Sloane & Kirby for respondent.

TEMPLE, C.—This appeal is upon the judgment-roll. The suit is to foreclose a mortgage, which is fully set out in the complaint. It recites that the mortgage is given to secure the payment of \$20,000, with interest, according to the terms of

a promissory note, "in the words and figures following." The note is then set out, and is as follows:

"2,000.

San Diego, Cal., Aug. 19, 1890.

"Two years after date, without grace, for value received. I promise to pay to the order of Paul Sainsevain, guardian, the sum of two thousand dollars, with interest thereon from this date until payment, at the rate of eleven per cent. per annum, payable quarterly; and, if not so paid, then to become part of the principal of this note, and to bear like rate of interest till paid; both principal and interest to be paid in United States gold coin. And I further agree that, in the event of suit being brought against me, then there shall be added to any judgment against me rendered in said suit, as counsel fees, an additional sum of ten per centum, in like gold coin, upon the amount of the principal and interest thereof accrued at the time of the entry of such judgment; or, if paid before judgment and after action commenced, then on the amount at date of payment.

"[Signed] M. A. LUCE."

The mortgage then contains a covenant that, in case of default in payment of interest, the whole sum of principal and interest shall become due. This, with a description of the property mortgaged, constitutes the entire mortgage.

Appellant first contends that the plaintiff cannot maintain this action because the note is payable to him as guardian, and, under our code, a guardian cannot maintain an action in his own name, but suit must be in the name of the ward. But the description of the payee as guardian, in the absence of any showing that there was a ward or a trust estate, does not show that the money did not belong to plaintiff. There is nothing in the mortgage or complaint which would justify a finding that the plaintiff is not the proper party to bring suit. If the defendant had answered averring that the note belonged to a ward of plaintiff, the description would have materially contributed to strengthen any proofs he may have had, but, standing alone, it is of no consequence.

It is next objected that the mortgage was not given to secure an attorney's fee, and that it was error to give plaintiff a lien for that. In this respect I think the decree is erroneous, and must be modified. A mortgage is but a contract for a lien, and is whatever the parties make it. This mortgage in

terms only secures the payment of \$2,000, and interest, and cannot, by implication or otherwise, be construed to give a lien for the attorney's fee: *Clemens v. Luce*, 101 Cal. 432, 35 Pac. 1032.

Respondent does not claim that he is at least entitled to a personal judgment in case he is denied a lien for the attorney's fee. It is therefore not necessary to determine whether such relief might be obtained in this suit. I think the decree should be modified by deducting therefrom the amount of the attorney's fee allowed.

We concur: Vanclief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion, it is ordered that the decree be modified by deducting therefrom the sum of \$200, the amount of the attorney's fee therein allowed, and, as so modified, the judgment appealed from is affirmed.

LEE v. McCARTHY et al.

No. 19,302; February 28, 1894.

35 Pac. 1034.

Mortgage Foreclosure.—A Lien for Attorneys' Fees cannot be Obtained in a suit to foreclose a mortgage which contains a provision that, should suit be commenced, or an attorney employed, the mortgagors agree to pay an additional sum of ten per cent on principal and accrued interest as attorneys' fees, since the mortgage does not purport to secure such fees.¹

Attorney Fees—Allegation of Agreement for.—Attorneys' Fees cannot be recovered where the agreement to pay them is not directly

¹ Cited and followed in *Irvine v. Perry*, 119 Cal. 357, 51 Pac. 546, a case which the court said "is on all-fours with" it.

Cited and approved in *Russell v. Findley*, 122 Cal. 480, 55 Pac. 144, where costs and fees were held not a lien in a case where the mortgage, though providing that the mortgagee on foreclosure should recover them, did not in terms provide that they were secured by the mortgage nor that they should be paid out of the proceeds of the sale under it.

averred in the complaint, but is merely inferable from an exhibit annexed thereto.¹

APPEAL from Superior Court, San Diego County; W. L. Pierce, Judge.

Action by Lee against McCarthy and another to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Modified.

Luce & McDonald for appellants; A. E. Nutt for respondent.

PER CURIAM.—This case is not distinguishable in principle from *Clemens v. Luce*, 101 Cal. 432, 35 Pac. 1032. The agreement providing for attorneys' fees in case of suit is contained in the mortgage instead of the bond, and is as follows: "Should suit be commenced, or an attorney employed, to collect the said promissory bond, or any of said interest coupons, the mortgagors agree to pay an additional sum of ten per cent on principal and accrued interest as attorneys' fees." The mortgage does not purport to be given to secure these attorneys' fees, and the agreement can have no greater force than if it were contained in the bond, or in a separate instrument. It may be added that this agreement to pay attorneys' fees is not directly averred in the complaint, but is merely inferred from being contained in an exhibit annexed thereto; and it is a well-established rule in pleading that "whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint": *Burkett v. Griffith*, 90 Cal. 542, 25 Am. St. Rep. 151, 13 L. R. A. 707, 27 Pac. 527.

The cause is remanded, with directions to the court below to modify the judgment by striking therefrom the amount of the attorneys' fees allowed; in all other respects the judgment and order appealed from to be affirmed.

¹ Cited and followed in *Lyle v. Winn*, 45 Fla. 422, 34 South. 159, where in a bill for foreclosure no claim for attorneys' fees was set up, no allegation made that any such had been incurred by the complainants, or that the latter had been put to any cost in the premises, and no prayer for the allowance inserted.

CASTRO et al. v. CITY AND COUNTY OF SAN FRANCISCO et al.

No. 15,029; March 2, 1894.

35 Pac. 1035.

Dismissal of Suit for Delay in Prosecution.—It is within the sound discretion of the lower court to dismiss an action for inexcusable delay in failing, for two years after the commencement of the action, to serve defendant with process.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by one Castro and others against the city and county of San Francisco, one Barkley and others. From an order dismissing the action on motion of defendant Barkley, plaintiffs appeal. Affirmed.

D. L. Smoot for appellants; John Lord Love for respondent.

PATERSON, J.—This is an action against the city and county of San Francisco and a large number of individuals to declare that the city and county of San Francisco, and those claiming under it, are trustees of the plaintiffs as to the property described in the complaint, and for an accounting of the rents, issues and profits of the same. The appeal is from an order of the superior court dismissing the action. The ground of the motion for a dismissal was want of ordinary diligence in prosecuting the action. The affidavit of the defendant Barkley showed that the action was commenced on the nineteenth day of June, 1889, but that he was never served with process until the seventeenth day of November, 1891; that no diligence had been exercised to serve him prior to said seventeenth day of November; that he had for several years prior thereto continuously resided on the premises described in the schedule, and had for two years been employed as a bookkeeper for the Pacific Bridge Company, at No. 4 California street, in the city and county of San Francisco, where he could have been found at any time during business hours. The affidavit further stated that plaintiffs' claim was a

“shadowy cloud in the minds of some persons when property within the boundaries of the premises embraced in said complaint are sold or mortgaged”; and that it was not the intention of the plaintiffs to bring the cause on for trial “so long as they can get one dollar a front foot from persons who happen to want to sell or mortgage, and desire the cloud removed.” The plaintiffs filed a counter-affidavit, denying the statement that they did not intend to bring the cause on for trial, or that they had failed to prosecute their action with reasonable diligence; and alleging that the pendency of the action had been widely advertised in the public print, and that the delay had been caused by reason of the great number of defendants and expense of serving them with process; that a large number of defendants had been promptly served with the summons, but a motion to quash the same for clerical misprision had been granted, which caused delay; that the defense set up by the city and county and other defendants would test the merits of plaintiffs’ case, and, if the former should prove successful, the benefit would fall to all of the defendants, whether served with process or not.

It is claimed by appellant that the court had no power to dismiss as to respondent Barkley, because he was served with process within three years after the complaint was filed, and section 581, subdivision 7, Code of Civil Procedure, as amended by the act of March 19, 1889, is cited in support of the contention; but in *Kreiss v. Hotaling*, 99 Cal. 383, 33 Pac. 1125, we said, speaking of that amendment: “The discretion of the court to determine whether there has been an inexcusable delay within the term of three years still remains, and each case must be determined upon its own peculiar circumstances”: See, also, *Murray v. Gleeson*, 100 Cal. 511, 35 Pac. 88. Upon the showing made in this case, we cannot say that the court below abused its discretion in granting the motion to dismiss. The order is affirmed.

We concur: Harrison, J.; Garoutte, J.

DIXON v. PLUNS.

No. 14,429; March 2, 1894.

35 Pac. 1047.

Costs on Appeal in Case of Reversal in Part.—On appeal from a judgment and order denying a new trial, where the court orders the submission set aside as to the appeal from the judgment and the hearing thereon continued until further orders, but on the other appeal reverses the order denying new trial, appellant is entitled to his costs.

APPEAL from Superior Court, City and County of San Francisco; Eugene R. Garber, Judge.

Action by Katie E. Dixon against William J. F. W. Pluns for damages for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed: See 3 Cal. Unrep. 735, 31 Pac. 931; 98 Cal. 384, 33 Pac. 268. On motion to amend remittitur. Denied.

H. C. Firebaugh for appellant; Nagle & Nagle for respondent.

PER CURIAM.—The appeal in this case was taken from the judgment and order denying a motion for a new trial. After the case was submitted for decision, the court ordered the submission set aside as to the appeal from the judgment, and continued the hearing thereon until the further order of the court. The appeal from the order denying a motion for a new trial was successful, and that order was reversed, with certain directions to the trial court. The remittitur issued upon the judgment of reversal allowed costs of appeal to appellant. A motion is now made to recall the remittitur and amend or modify the same by striking out that portion giving appellant his costs on appeal. The motion is denied. The order denying the motion for a new trial being reversed, the appellant is entitled to his costs on appeal under rule 23 of this court.

STEWART v. DUNLAP.

No. 18,183; March 2, 1894.

36 Pac. 2.

Appeal—Question not Raised Below.—A judgment in an action by the assignee of an insolvent will not be reversed on the ground, raised for the first time on appeal, that the complaint contained no averment showing that in the proceedings for plaintiff's appointment a copy of the petition filed by creditors was served on the insolvent, as required by statute, the record being silent on the subject.

APPEAL from Superior Court, Colusa County; E. A. Bridgford, Judge.

Trover by Malcolm Stewart, assignee of the estate of W. C. Baber, an insolvent debtor, against Herman Dunlap. Judgment for plaintiff. Defendant appeals. Affirmed.

John T. Harrington for appellant; W. G. Dyas and U. W. Brown for respondent.

BELCHER, C.—The plaintiff, as assignee of the estate of one W. C. Baber, an insolvent debtor, brought this action to recover the value of certain personal property alleged to have belonged to the said estate, and to have been converted by defendant to his own use. To show plaintiff's authority to sue, it is averred in the complaint that certain creditors of said Baber duly filed a petition in involuntary insolvency against him, and that upon the filing of the petition the court made an order that he appear at a time and place named, and show cause why he should not be adjudged an insolvent debtor, as prayed for in the petition, and that on the next day he was duly and personally served with a copy of the said order; that thereafter the court duly made and caused to be entered its order adjudging him to be, and to have been at the time of filing the petition, an insolvent debtor, and requiring him to file in court the schedule and inventory provided for in the insolvent act; that thereafter the insolvent filed the schedule and inventory, and thereupon the court made an order appointing the time and place for the meeting of the

creditors to prove their debts, and choose one or more assignees of the estate; that thereafter, at the time and place appointed, the plaintiff was duly elected by the creditors assignee of the estate, and duly qualified as such, and afterward the clerk of the court duly assigned and conveyed to him all the estate, real and personal, of said insolvent. No demurrer to the complaint was interposed, and the answer denied none of the averments above referred to. The case was tried by the court, and judgment given for the plaintiff, from which the defendant appeals on the judgment-roll.

The only point made for a reversal is that it does not appear that the court ever acquired jurisdiction of the insolvent in the insolvency proceedings, for the reason that the complaint contains no averment showing that a copy of the petition filed by the creditors was served upon him, with a copy of the order to show cause, as required by section 10 of the insolvent act. This point is apparently made here for the first time, and a sufficient answer to it is that it does not appear that a copy of the petition was not served on the insolvent—the record is simply silent on the subject—and it does appear that he appeared and filed his schedule and inventory, and thereby voluntarily submitted himself to the jurisdiction of the court, and that the court duly adjudged him to be an insolvent debtor, and the clerk duly assigned and conveyed to the plaintiff all of his estate. The law presumes that a court or judge, acting as such, was acting in the lawful exercise of his jurisdiction: Code Civ. Proc., sec. 1963, subd. 16. Under the circumstances shown, it is too late to raise the question of the jurisdiction of the court here. The judgment should be affirmed.

We concur: Temple, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

PEOPLE v. STRYBE et al.

No. 21,046; March 3, 1894.

36 Pac. 3.

Accomplice—Corroboration—Instructions.—On a Murder Trial, the court, on evidence fully authorizing it, submitted to the jury the question as to whether or not a certain witness for the state was an accomplice. The only corroborative evidence was given by the wife of such witness, who testified to certain oral confessions. Held, that it was error to refuse to charge that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of defendants ought to be viewed with caution, under Code of Civil Procedure, section 2061, which directs such instructions to be given "on all proper occasions."

Accomplice—Corroboration—Instructions.—It was also Error to refuse to charge that, if the jury found such witness to be an accomplice, and did not believe the evidence of his wife, then there was no corroborating evidence of the accomplice, and it was their duty to acquit.¹

APPEAL from Superior Court, Sacramento County; Matt. F. Johnson, Judge.

Manuel Strybe and Richard Strybe were jointly convicted of murder, and they appeal. Reversed.

Hiram W. Johnson and Johnson & Johnson for appellants; Frank D. Ryan, district attorney, and W. H. H. Hart, attorney general, for the people.

* BELCHER, C.—The defendants were jointly charged by information with the murder of one A. G. Damon, in the county of Sacramento, on the — day of March, 1888. The information was filed April 15, 1893, and the trial thereafter resulted in a verdict against both defendants of guilty of murder in the second degree, and in a judgment that they be

¹ Cited in *People v. Buckley*, 143 Cal. 391, 77 Pac. 176, where, while approving it, the court says that it and the similar cases—*People v. Bonney*, 98 Cal. 278, 33 Pac. 351, and *People v. Silva*, 121 Cal. 668, 54 Pac. 146—"were all cases where the proposed instruction was limited to the language of the statute."

imprisoned in the state prison at Folsom for the term of thirty years. From this judgment, and from an order denying their motion for a new trial, they have appealed.

The theory of the prosecution at the trial was that on the evening of March 6, 1888, Damon went into a disreputable house, known as the "Mobile House," situate at the southeast corner of Second street and the alley between L and M streets, in the city of Sacramento; that defendants were also in the house, and that, with the intent to rob Damon of his money, and with the aid of one Kate Cooper, who was with them, they induced him to drink some whisky, in which they had put a large quantity of morphine, and that the drinking of it caused his death. It was proved that, about 5 o'clock in the afternoon of the day named, Damon went to the Western House and ate his supper, and then went down to the corner of Second and K streets and took a cigar; that after standing there four or five minutes he walked down Second street, and turned into the Mobile House, and that he then appeared to be sober and had in his possession about \$200 in money; that a little after 8 o'clock in the same evening he was found groaning and in an unconscious condition, lying on the north side of the alley, about opposite the rear end of the Mobile House, and that he was then removed to the station-house, and shortly thereafter died; that, when found, the only valuables about him were two silver dollars, a pair of spectacles, and a silver or plated watch; that a physician was called to see him at the station-house, who testified that he found him lying in an unconscious condition, breathing heavily, and from his breathing and general appearance suspected poisoning; that in his opinion he was suffering from narcotic poisoning—that is, some poison that produces insensibility, like opium or morphine; that on the next day a post-mortem examination was made by the physician of the county hospital, who testified: "I examined all the principal vital organs. The cause of death was not determined by the autopsy. There was evidence of overfullness of the vessels of the brain. There was some evidence of disease in the lungs. Further than that, the organs were normal. The brain was found to be very much charged with blood. The purpose of the examination was to determine the cause of death. The cause of death was not determined by my report. It is possible that some narcotic drug caused

death. It would be merely a surmise to say that the conditions that I found would lead to that conclusion. There was no positive evidence as to what was the cause of death. I made no examination of the stomach or its contents. . . . I arrived at no conclusion as to the cause of death."

To connect the defendants with the commission of the offense charged, the prosecution then called as a witness one Richard Reed, whose testimony, briefly stated, was in substance as follows: He had lived in Sacramento thirteen years, and had known defendants six or seven years, and had been familiar and running with them for a year or more prior to March 6, 1889. Knew Kate Cooper and Mollie Jones, and was familiar with the Mobile House. It was kept by Mollie Jones prior to March 6th, but she was then in jail, and Kate Cooper and Manuel Strybe were then living in it. It had four rooms, the front room opening on Second street, and the rear room having an entrance from the alley. About 5 o'clock on March 6th he went through the alley into the rear room without knocking, as he was accustomed to do, and found the two defendants sitting there at a table. Kate Cooper came in and says: "We've got a sucker. He's got stuff." One of defendants said: "We are going to have it. Give him some whisky and morphine." Dick said: "Where are we going to get the morphine?" Manuel said: "It is in Mollie's bureau drawer." Kate said she would get the whisky, and she and Manuel went out, and shortly returned. She poured out two glasses of whisky, and he put in some morphine. She then took a tray, and, with the two glasses of whisky on it, went out of the room, and that was the last the witness saw of her for a day or two. He remained ten or fifteen minutes, and then went away. He met defendants at the corner of Second and K streets between 8 and half-past 8, and said, "What did you do, boys?" and one of them spoke up, "We doped him and drug him out in the alley, and left him." A few days later, witness had a conversation with Manuel. "He came and told me to go down under the cellar, and there was some cash buried there. I was to dig down and find two handkerchiefs. One had about \$150 and the other about \$100. I went there and made an examination, but I didn't find the money. He told me he went there a few days after, and found a handkerchief that contained the \$100. He said the

officers got away with the other.” The witness knew that Damon was found in the alley and died, but never told anyone what he knew about the matter until the fall of 1892. Then he had a falling out with defendants, and said: “I told him if he bothered me any more I would kill him.” “I told Manuel he must recollect I knew something about the Mobile case. He says: ‘Hell! you are as deep in the mire as we are in the mud.’” “The row I had with them was in Green’s saloon. I might have said then: ‘You son-of-a-bitch, I will fix you.’” “After I had a falling out with them, I met Officer Gibson, and he wanted me to tell him about this matter, and I said ‘No,’ that I wouldn’t say anything about it. Finally, I agreed to tell him, provided I could see the city attorney and the district attorney, so that I could be all right. I did not say a word before they promised that they would not prosecute me. I made an agreement first that I should not be prosecuted.”

The only testimony introduced to corroborate the testimony of Reed was that of his wife, Helen Reed. She testified that in March, 1888, she was living with her husband in the Colusa House, in Sacramento, and had three rooms; that she knew the defendants, and remembered the occasion of Damon being found in the alley; that between 7 and 8 o’clock on that night defendants came to her house and asked for her husband, and she told them he was out, but would be in soon, and to come in and sit down; that they remained about ten minutes in the front room, and she was sitting six or eight feet from them in the same room; that they were talking between themselves, and she could hear them; that the first thing said was, Robert asked, “Where is he?” and Manuel replied, “The old stiff is in the alley,” and Robert then asked about the money, and Manuel said, “It is all right.” On cross-examination the witness testified: “Never had any conversation with my husband about it. Never told him anything about what I overheard. Never asked him what it meant. I knew, when the papers came out, about the killing of Damon. I understood then what it meant. . . . Never spoke a word to him about it. Lived with him as his wife ever since, continuously to the present time, and have never spoken to him about what I overheard. . . . I never talked to my husband on this subject at all. I know Mollie Jones. I told her I didn’t know any-

thing about this case, and I didn't want to know anything about it. I was talking then. I was not sworn. I tell a person anything. . . . It never occurred to me that I ought to notify the authorities about what occurred that night. I have never thought of what was said that night in 1888, until I have taken the stand here."

For the defense, twelve witnesses were called, and testified that they knew the reputation of Richard Reed for truth, honesty and integrity, and that it was bad; and their testimony in this regard was in no way contradicted. It was proved by two police officers that shortly after the death of Damon they separately asked Reed if he knew anything about the matter, and he said he did not. It was also proved that after he had the falling out with the defendants in September, 1892, he said to one witness, speaking of them, "Those sons-of-bitches, I will have them in jail in twenty-four hours," and to another witness he said, "They were a couple of sons-of-bitches that he was going to do up; that he was going to job them, and if he could not do anything else, he would run them out of town." It was further shown that his testimony given at the preliminary examination was in many respects different from and contradictory of that given at the trial.

The defendant Richard was called as a witness in his own behalf, and denied that he was in Sacramento at the time of the alleged murder, or that he had anything to do with it, or knew anything about it, and said that he was in Davisville, Yolo county, at the time named; and in this he was supported by the testimony of his two brothers, Manuel and Stephen. The defendant Manuel was also called as a witness, and denied all the statements made by Reed; and he said: "Neither I alone, nor my brother and myself, called at Mrs. Reed's or Mr. Reed's house the night of the 6th of March, or had any conversation of any kind in that house then. Never at any time did we have any conversation about carrying a stiff in the alley, or about money. . . . I was not with Richard Reed that day or evening at all."

It is earnestly contended for appellants that, looking at all the evidence, a verdict of guilty was clearly not warranted, and also that numerous errors of law were committed by the court in its rulings upon the admission of evidence, which call for a reversal; but we do not deem it necessary to notice these

points particularly. The court, of its own motion, instructed the jury at great length, and, among other things, told them that it was for them to determine whether or not Richard Reed was an accomplice; that to be an accomplice it was not necessary to actually participate in the crime; and that a conviction could not be had on the testimony of an accomplice, unless he was corroborated by other evidence, etc. The defendants asked and the court refused to give the following instructions: "I instruct you that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of the defendants in this case ought to be viewed with caution." "I instruct you that if you find the witness Richard Reed to be an accomplice, and you do not believe the evidence of the witness Mrs. Richard Reed, then there is no corroborating evidence of the accomplice in this case, and it is your duty to acquit the defendants." In view of the testimony, these instructions, we think, should have been given. The first is substantially in the language of section 2061, subdivision 4, of the Code of Civil Procedure, which directs that the jury are to be so "instructed by the court on all proper occasions"; and in *People v. Bonney*, 98 Cal. 278, 33 Pac. 98, the refusal to give such an instruction was held to be error. It is objected for the people that this was not a proper occasion for giving the instruction, because it was not proved that Reed was an accomplice; but the court expressly submitted to the jury the question of whether he was an accomplice or not, and the evidence was fully sufficient to authorize such a submission. "An accomplice is defined to be one who is in some way concerned in the commission of a crime, though not as a principal; and this includes all persons who have been concerned in its commission, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact": *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474. The second instruction referred to stated the law correctly, and it was proper, under the circumstances shown, that such an instruction should be asked and given. The judgment and order should be reversed and the cause remanded for a new trial.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

In re WILLIAMS' ESTATE.

No. 18,247; March 3, 1894.

36 Pac. 6.

Appeal—Dismissal—Striking Out Record.—A motion to dismiss appeals involving an inquiry into the merits will not be considered.¹

A Motion to Strike from the Records a Certain Order and Findings will not be considered until final hearing.

APPEAL from Superior Court, Sacramento County; Matt. F. Johnson, Judge.

Motions by respondents to dismiss appeals and strike matter from record. Denied.

Johnson, Johnson & Johnson for appellants; McKune & George and L. T. Hatfield for respondents.

PER CURIAM.—The respondents have moved to dismiss the appeals in this case upon the ground that the appellants are not persons aggrieved by the order and decree appealed from. The determination of this motion involves an inquiry as to the merits of the case, and must, for that reason, be denied at this time.

Respondents have also moved to strike from the transcript and disregard a certain order and additional finding made July 29, 1893, on the ground that the same is not part of the record. The motion is premature. The question attempted

¹ Cited with approval in Estate of Sharp, 10 Cal. App. 3, 100 Pac. 1071, where its principle is applied to a motion to dismiss the appeal of a case the whole question in which hinges on whether the court below had jurisdiction or not and its determination would involve the merits.

to be presented by the motion is one which, if necessary to the decision of the case, will be considered in the final decision of the case. This motion will therefore be denied. The application to amend the record, in accordance with the certificate of the clerk accompanying the application, is granted.

PEOPLE v. KILVINGTON.*

No. 21,033; March 3, 1894.

36 Pac. 13.

Indictment—Correction.—Where It is Apparent That a Defendant has had a fair and full examination before an examining magistrate, and has been held to appear and answer on a criminal charge, and an information against him has been set aside for some technical error or irregularity, not going to the merits—such as failure to certify the depositions in a homicide case—the court may permit a correction to be made, and a new information filed, without a further examination before a committing magistrate.¹

Homicide—Evidence.—In a Homicide Case Where Defendant, a police officer, shot at—intending to frighten—deceased, who was running away from a person who was shouting “Stop thief!” the admission of evidence that deceased had gone to the place for a lawful purpose, though improper, is harmless, the real question being whether defendant acted with criminal negligence.

Homicide—Evidence—Impeachment.—On a prosecution of a police officer for killing deceased, who was being pursued by a person shouting “Stop thief!” such person, having testified for defendant, may be impeached by evidence that, a few days before, he had a quarrel with deceased, he having testified that he never saw him before the time of the shooting.

Homicide—Shooting by Police Officer.—On a Prosecution of a police officer for shooting deceased, who was running from a person who was shouting “Stop thief!” defendant having testified that he

*For subsequent opinion, see 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799.

¹ Cited and followed in *People v. Lane*, 101 Cal. 515, 36 Pac. 17, where the committing magistrate had failed to make, at the conclusion of the examination, a proper indorsement of the commitment on the complaint.

intended to shoot over him, an instruction that act and evil intent must combine to constitute crime is properly refused, the question being whether there was criminal negligence.

Homicide—Shooting Through Negligence.—Where one shoots a person through criminal negligence, his ignorance of the law can form no basis for acquittal.

Homicide—Shooting by Police Officer.—The Fact That the Person whom defendant (a police officer) shot was being pursued by a person shouting "Stop thief!" did not raise an implication that a felony had been committed, by reason of which he might shoot him to effect his arrest.

APPEAL from Superior Court, Santa Clara County; W. A. Lorigan, Judge.

George Kilvington was convicted of manslaughter and appeals. Affirmed.

Wm. P. Veuve for appellant; V. A. Scheller, Spencer & Burchard, E. E. Cothran and W. H. H. Hart, attorney general, for the people.

PER CURIAM.—The defendant, George Kilvington, was informed against by the district attorney of the county of Santa Clara for the crime of murder, alleged to have been committed at said county on the third day of May, 1892, by the felonious killing of one Henry Schmidt. Upon a trial the defendant was convicted of manslaughter, and adjudged to be punished by imprisonment in the state prison of the state of California, at San Quentin, for the term of seven years. The appeal is from the final judgment, and from an order denying a new trial.

The first point made on behalf of appellant is that the court below erred in refusing a motion on his part to set aside the information. The facts essential to a correct understanding of the question involved are as follows: On the twenty-fifth day of May, 1892, defendant was examined before a justice of the peace of San Jose, in the county of Santa Clara, on a charge of having murdered Henry Schmidt, and was held by the magistrate on a charge of manslaughter, in the killing of said Schmidt. On the seventh day of June, 1892, the district attorney of said county filed an information for murder

against defendant, for killing said Schmidt, which information was on the fourteenth day of June, 1892, on motion of counsel for defendant, and by consent of counsel for the people, set aside and dismissed, and a new information ordered by the court to be filed by the district attorney against the defendant, upon the ground that the testimony taken by the reporter at the preliminary examination, and by him written out in longhand and filed in the superior court, was not certified to by said reporter before filing with the county clerk; that the original notes of the reporter had not been filed with such clerk; and that neither were filed within ten days after the close of such examination. At the time of the order of dismissal the court also ordered the testimony on file withdrawn to be certified to. Thereupon the transcript of the testimony, duly certified, was filed, together with the original shorthand notes, and the order of the committing magistrate made May 26, 1892, holding defendant for manslaughter as aforesaid, but without any other or further examination before a magistrate. A new information, charging the defendant with the murder of said Schmidt, was thereupon, and on the fifteenth day of June, 1892, duly filed in the superior court, and defendant's motion to dismiss the same was denied. Appellant refers, as authority for his contention, to the case of *Ex parte Baker*, 88 Cal. 84, 25 Pac. 966, in which this court says: "And, if the information is set aside upon the ground that the defendant has not been legally committed, it can readily be seen that it would be idle for the court to order another information to be filed, for the same fatal defects would necessarily be present at any future hearing." The facts of that case no doubt warranted the expression there used. There, so far as appeared, no other or further cause was shown in support of the second information than the first. The facts here are quite different: (1) It does not appear from the record in this case that the commitment was filed prior to the presentation of the first information. (2) It does affirmatively appear that the reporter's notes were not filed, and that the depositions written out in longhand were not certified, at the time of filing the first information. If it was in fact filed, being for manslaughter, the district attorney was not authorized, in the absence of depositions duly certified, to present an information for any higher offense than that

indicated in the commitment. Under these circumstances the information was properly and promptly set aside, upon the ground that, as to the offense with which the defendant stood charged, there was no evidence "that before the filing thereof [the information] the defendant had not been legally committed by a magistrate," as provided by section 995 of the Penal Code. The first information charging the defendant with murder was beyond and in excess of the jurisdiction of the district attorney, and utterly void. The second information, which was filed within thirty days after commitment, was not so filed until after the commitment, the notes of the reporter, and the depositions written out in longhand, and duly certified, were on file. We have no doubt of the correctness of the following propositions: (1) If A has been properly examined before a magistrate, but no order holding him to appear before a proper court has in fact been made, an information filed against him before the commitment is entered and depositions are sent up is void. (2) In such a case, upon the filing of the order of commitment and depositions, the district attorney may, within the time provided by law, file a proper information; and the fact that the former information has been set aside by the court will not, in such a case, render a second examination and commitment necessary. Section 997 of the Penal Code provides that, if an indictment or information is set aside, the defendant, if in custody, shall be discharged, etc., unless the court directs that the case be re-submitted to the same or another grand jury, or that an information be filed by the district attorney. The evident object of the statute, in authorizing the court to direct the district attorney to file another information when the first had been set aside, was, it is believed, to provide for a class of cases in which a proper examination has been had, but yet, from some informality or omission, the evidence thereof is wanting, or defective, so that it cannot be said, judicially, that the defendant has been, before the filing of the information, legally committed by a magistrate. The case at bar affords a familiar example. The depositions on file brought to the court knowledge that depositions had been taken, and that an examination had been had before a magistrate, but not being duly certified, as required by section 869 of the Penal Code, they lacked the verity essential as a basis for an information for

murder, which could only be founded upon them, because the order of probable cause, if it appeared upon the depositions, or was entered in the docket of the magistrate, or otherwise reduced to writing, as we know, only held the defendant to answer for manslaughter. In *People v. Thompson*, 84 Cal. 598, 24 Pac. 384, this court held that the court below properly set aside an information because the indorsement on the depositions returned was not in accordance with the statute, and that, having done so, there was no error in directing such depositions to be returned to the justice for proper indorsement, and that such indorsement could be made without a re-examination of the case. In *People v. Wallace*, 94 Cal., at page 500, 29 Pac. 950, the decision in *People v. Thompson* was approved, although some doubts may have been entertained as to the broad scope of the reasoning. From the consensus of opinion expressed by this court in different cases, and from the wording of the Penal Code, the conclusion is reached that, where it is apparent that a defendant has had a fair and full primary examination before a committing magistrate, and has been held to appear and answer before a superior court upon a criminal charge, and an information has been filed against him, which has been, upon his motion, set aside for some technical error, or irregularity, not going to the merits of the case, and which may be remedied and a new information filed, the superior court is authorized and empowered, under section 997 of the Penal Code, to permit a correction to be made, and to direct a new information to be filed, without a further or other examination before a committing magistrate, and that the reasoning in *Ex parte Baker*, 88 Cal. 84, 25 Pac. 966, should be confined to cases in which the information is set aside for causes other than merely technical, and susceptible of remedy without impairing the substantial rights of a defendant. It follows that the court did not err in refusing to set aside the second information filed against defendant.

Louis Schloss was called as a witness on the part of the prosecution, and having identified the spot where deceased was killed, by a pool of blood which he found, and which other witnesses identified as the place of the homicide, was asked the following question: "Do you know of any business he [deceased] had there, on that particular locality, at that time?" Counsel for defendant objected to the question upon

the ground that it is immaterial, irrelevant and incompetent. The objection was overruled, to which ruling an exception was taken. The witness then testified, in substance, that on the third day of May, about 4 to 5 o'clock P. M., he negotiated with deceased, who was a butcher, in regard to the sale to the latter of a lot, situated about one hundred feet from where he was killed, and that deceased said to him that he would go down and see the lot that night, when he closed his shop, as he could not get off before, and would see the witness the next morning. Deceased was shot that night by defendant at about 9 o'clock P. M. In view of testimony introduced later by the defense, this testimony is claimed to have been important. The witness was permitted, also, against the objection of defendant, to draw and exhibit to the jury a diagram of the surroundings, showing the location of the streets, the lot in question, the pool of blood, etc. Testimony of the witness Weisel was also admitted, over defendant's objection, tending to show that deceased was rightfully at the place when he was shot. This testimony as to the reasons why deceased was at the place at which he was killed was, we think, improperly admitted; for the real question was whether the defendant, under the circumstances as they appeared to him, acted recklessly and with criminal negligence; but we think that such testimony was unimportant and not prejudicial to appellant. The defendant was night watchman in Chinatown, San Jose, and was, as the court instructed the jury, "a police officer" of the city of San Jose. On the night of the third day of May, 1892, he had been at Chinatown with one Henry Burgess to show the latter through a cannery which defendant, as a carpenter, had erected, or had aided in erecting. On their return and when on Taylor street, which seems to be a new street, and not fenced, at least on one side, they heard someone cry "Stop him!" or "Stop thief!" and two men were observed running across the open ground northerly, and diagonally to their course, in a direction which, if continued, would have taken them across defendant's line of travel, from twenty feet to twenty yards ahead of defendant and his companion. The two men running were not together, but one was in advance, and the other pursuing him, and crying out to stop him, or "Stop thief!" The night was dark, but the parties were visible at some distance. Defendant ordered the man in ad-

vance to stop, and, as he claims, repeated the order two or three times, until the stranger threw up his hands, when, as defendant claims, he saw something in the man's hands, drew his pistol, and fired, killing the man, who at the time was say thirty feet distant, and who fell upon his face, and who, upon examination, had no weapons, and was, as it proved, Henry Schmidt. Defendant did not, so far as appears, recognize deceased before firing the fatal shot, and, as he testifies, intended to shoot over his head; but the deceased being upon higher ground, by two or three feet, the ball entered his neck. The man in pursuit proved to be one William H. Howard. The testimony of the latter was lengthy, but may be epitomized as follows: He was passing the house of one Mrs. Hayford, when a man ran out of the back yard, who he thought was a criminal, and pursued, crying "Stop!" or "Stop thief!" for some distance, with the result as above stated. There were upon the face of Schmidt, when found dead, bruises and wounds, such as might have been made by a blow or blows of the fist or from a blunt instrument, and which a number of physicians testified must have been inflicted before death. Others were of the opinion these wounds might have been caused by contact with the earth when Schmidt was shot, and fell upon his face. Howard testified that he was not personally acquainted with Schmidt, and had never spoken to him; never had any trouble with him; did not have an altercation with him on the Monday preceding; was not in town that day, etc. In rebuttal, and for the purpose of impeaching the witness Howard, one Harrison was called by the prosecution, and testified that, on the Monday next preceding the Wednesday on which the homicide was committed, the witness Howard had a quarrel with Schmidt, during which he threatened the latter, and used vile and obscene language to him; and the admission of this testimony is assigned as error. The evidence was clearly admissible. The theory of the prosecution was that the contused wounds upon the face of deceased had been inflicted by Howard, and that deceased was fleeing from him, and not as a criminal, when shot; and, to the extent to which it contradicted the testimony of Howard, it was admissible. It tended in some degree to render the testimony of Howard improbable—**nothing more.**

The court instructed the jury at length, on its own motion, and at the request of counsel for the prosecution and defense, which instructions were as to the right of defendant, as a police officer, to arrest, as provided by law, persons whom he has reasonable cause to believe have committed a felony, and where a felony has in fact been committed, and he has reasonable cause to believe the person arrested to have committed it, his right to arrest at night; his right to use all the force reasonably necessary to effect the arrest, etc. Defendant asked the court to instruct the jury as follows: (1) "The jury are instructed that an act and evil intent must combine, to constitute, in law, a crime, and that each of these elements, to wit, the act and evil intent, must be proven beyond reasonable doubt." The court refused the instruction as asked, and gave the following in lieu thereof: (1) "The jury are instructed that to constitute, in law, a crime, there must exist a union or joint operation of act and intent or criminal negligence." It will be observed that the instruction as asked was erroneous, in that it eliminated entirely what in this case was the important factor, viz., the question of criminal negligence. As given, it was proper. The question of reasonable doubt was properly expounded to the jury elsewhere in the instructions. Like considerations apply to the second and third instructions asked by defendant, and refused by the court. The third is liable to the further objection that it sought to make defendant's ignorance of the law a basis upon which to acquit the defendant. The few exceptional cases in which it is said ignorance of the law prevents the formation of an intent to commit crime are exceptions to a general rule, and have no application to a case where criminal negligence is the main question in issue. The exceptional doctrine found at section 297 of Bishop on Criminal Law has no application here. The length to which this opinion has extended precludes the propriety of noticing seriatim all the instructions given or refused. It is sufficient to say that the jury was fully instructed upon all the issues submitted; that the instructions asked by the defendant and refused by the court were either given in other portions of the charge or in a modified and unexceptionable form, or properly refused as not embodying law applicable to the case.

One proposition further needs to be noticed. Defendant asked the court to give several instructions to the jury upon the subject of "probable cause," of which the following is a sample: "If the jury believes the evidence of the witness Burgess and the defendant, then the court instructs the jury, as a matter of law, that the defendant, at the time of the killing, had reasonable cause to believe that the deceased had committed a felony." And again: "The court instructs the jury that the uncontradicted evidence in this case shows that the defendant had reasonable cause to believe, at the time of the killing, that the deceased had committed a felony." The contention of appellant is that the question of probable cause is one of law, and that the court, upon the evidence, should have instructed the jury as indicated in the foregoing. Assuming for present purposes that the rule in criminal cases is the same as in actions for malicious prosecution, then we think the court should have instructed the jury that no probable cause was shown for believing that Schmidt had committed a felony. The evidence was sufficient to show probable cause to warrant defendant in making an arrest, and, in an action for false imprisonment for detaining Schmidt, would have been, we may assume, a justification of defendant therefor. But how a cry of "Stop him!" or "Stop thief!" raises an implication that a felony has been committed, any more than a misdemeanor, is not apparent. The term "thief" applies equally to one who has committed petty larceny, which is not a felony, as to one guilty of grand larceny, which is a felony; and as an officer may not go to the extreme of slaying one who is only guilty of a misdemeanor, in order to effect his arrest, there should be, even according to appellant's contention, evidence showing that a felony has been committed, not that it may have been, before the court can properly instruct the jury, as matter of law, that an officer has reasonable cause to believe that a felony has been committed. Under the testimony, the question whether defendant had reasonable cause to believe deceased had committed a felony was one of fact, to be determined by the jury, and not a question of law, to be arbitrarily passed upon by the court. The court so viewed it, and instructed the jury fully in that view, and therein committed no error. The instructions upon the question of reasonable doubt were all that were required. The case seems to have

been fairly tried, the defendant well defended, and properly convicted of manslaughter. The judgment and order appealed from are affirmed.

DE HAVEN and HARRISON, JJ.—We dissent. The evidence of Schloss and Weisel, referred to in the foregoing opinion, was clearly irrelevant; and we cannot say that it was not used upon the trial, and in the argument before the jury, to the prejudice of the defendant. In this case it was of the utmost importance to the defendant that the evidence should be confined to the single question before the jury, which was whether the defendant, upon the circumstances as actually presented to him, was guilty of criminal negligence in firing the shot which killed the deceased; and, as the evidence was not so confined, we are of the opinion that the judgment and order should be reversed.

USHER v. USHER.

No. 18,236; March 7, 1894.

36 Pac. 8.

Divorce—Change of Venue.—A Motion by Defendant in divorce to change the place of trial to a county other than that in which the action was brought, on the ground that defendant resides in the former county, should be granted, where the affidavit of plaintiff creates no substantial conflict with defendant's, as to his residence.¹

APPEAL from Superior Court, Tulare County; Wheaton A. Gray, Judge.

¹ Cited and explained in *Cochrane v. McDonald*, 4 Cal. Prob. Dec. 538, 539, where attention is called to its being a divorce case, wherefore, notwithstanding the amendment of March 10, 1891, of section 128 of the Civil Code, requiring such actions to be brought in the county of which the plaintiff had been a resident for three months next preceding the institution of the suit, the defendant could, of right, under section 395 of the Code of Civil Procedure, have the place of trial changed to the county of his residence.

Action by Dora Usher against J. B. Usher for a divorce. From an order denying his motion to change the place of trial to Tuolumne county, defendant appeals. Reversed.

J. B. Curtin for appellant; Rowen Irwin for respondent.

PER CURIAM.—Respondent brought her action for divorce in the county of Tulare, alleging her residence therein as required by law. The summons was served upon the defendant in the county of Tuolumne; and he moved for a change of the place of trial to that county, upon the ground that he was a resident of said last-named county at the time the action was commenced. His motion was denied, and this appeal is from the order denying his motion. The motion should have been granted. The affidavit of plaintiff is not sufficient to create a substantial conflict with the affidavit of defendant as to his residence; and upon the authority of Warner v. Warner, 100 Cal. 11, 34 Pac. 523, the judgment is reversed.

PEOPLE v. BELL.

No. 21,051; March 8, 1894.

36 Pac. 94.

Criminal Law—Record on Appeal—Continuances.—Where the record fails to show that defendant objected to numerous continuances, a denial of motion to dismiss, made on the ground that he had not been brought to trial within the time required by the Penal Code, will be affirmed.

APPEAL from Superior Court, City and County of San Francisco; D. J. Murphy, Judge.

Sidney Bell appeals from a conviction of robbery. Affirmed.

Henley & McSherry for appellant; Attorney General Hart and Wm. S. Barnes, district attorney, for the people.

SEARLS, C.—Defendant was informed against for the crime of robbery, and upon a trial had was convicted, and

judgment of imprisonment in the state prison for a term of ten years was entered, from which judgment this appeal is prosecuted.

One point only is made by appellant as cause for reversal. The information was filed in the superior court in and for the city and county of San Francisco, February 11, 1891. On the thirteenth day of the same month and year the cause was assigned to department 12 of said court, where, on the fourteenth day of February, the defendant was arraigned and given until February 21st to plead, on which last-mentioned day, he having refused to plead, a plea of not guilty was, by order of the court, entered, and the cause continued until February 28th to be set for trial. On the day last mentioned the cause was by consent of parties set for trial on the thirtieth day of March, 1891. Between the date last mentioned and May 7, 1891, the cause was continued some fifteen times; sometimes on motion of defendant, sometimes by consent of parties, and at others the record simply shows the cause to have been continued, without specifying the cause therefor, or upon whose motion the same was granted. On May 7, 1891, there is an entry in the record as follows: "Off calendar." On August 15, 1892, the cause was again continued on motion of defendant to August 22d, and thereafter was continued to September 3d, when, on motion of defendant, it was set down for trial on the sixth day of September, 1892. It was again continued by consent of parties to September 14th, when it was again set for trial on the fifteenth day of September, 1892. On that day, and before the trial commenced, defendant moved for a dismissal upon the ground that he had not been brought to trial within sixty days, as required by the Penal Code. The record fails to show that defendant ever at any time objected to any of the numerous continuances granted in the case. The case of *People v. Douglass* (decided by this court October 10, 1893), 100 Cal. 1, 34 Pac. 490, is in point, and conclusive against the contention of defendant here. In that case the court said: "It will be observed that it does not appear from the first entry that the defendant objected to the continuance, or that it was not granted with his full and free consent. And the rule is that, in the absence of any showing as to what took place when the order was made, the appellate court will presume, in support of the action of the

court below, that the defendant assented to the order: *People v. Swafford*, 65 Cal. 223," 3 Pac. 809. It was further said, as it has been said in numerous other cases, "that on appeal all intendments are in favor of the regularity of the action of the court below, and that error will never be presumed, but must affirmatively appear"; and that "under this rule it was incumbent upon the defendant, if he claimed error, to set out in his bill of exceptions the facts showing it." There are other reasons which might be advanced in support of the propriety of the action of the court below, but the foregoing is deemed sufficient. The judgment appealed from should be affirmed.

We concur: Haynes, C.; Belcher, C.

McFARLAND and FITZGERALD, JJ.—For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

DE HAVEN, J.—I concur in the judgment, not only for the reasons stated in the foregoing opinion, but also upon the ground stated in my concurring opinion in *People v. Douglass*, 100 Cal. 1, 34 Pac. 490.

PEOPLE v. DAVIS.

No. 21,035; March 13, 1894.

36 Pac. 96.

Jurors—Prejudice.—A Juror on His Voir Dire was Asked by the defense if he had any special prejudice against offenses "committed during Sunday broils." The district attorney, objecting, remarked that no one broiled but defendant. The juror was accepted without challenge. Held, no prejudice.

Jurors—Qualification.—Where a Juror Understands English "pretty well," but will not say that he could always understand what anyone might say in English, it is for the court to decide whether he is competent to comprehend all that might be said in his hearing.

Criminal Trial—Admission of Evidence Taken at Preliminary Examination.—A subpoena for the prosecuting witness, a farm laborer,

issued more than two weeks before the trial, and like writs sent and specially commended to the sheriffs of four adjoining counties, were all returned unserved. The county officer testified that inquiry had been made of the farmers in the chief towns of the county, and all over the county. Held, a predicate for a sworn stenographer's report of his evidence in the preliminary examination.

Criminal Trial—Admission of Evidence Taken at Preliminary Examination.—On error assigned to the admission of the reporter's record of evidence on preliminary examination, the certificate, if not set out in the record, is presumed to have been in proper form.

Criminal Trial—District Attorney Reading Instructions.—There is no objection to the district attorney's reading to the jury parts of the court's instructions, if the court permits.

Criminal Trial.—In the Absence of a Plea of Insanity, evidence that defendant had long ago been hit on the head and mentally and physically injured is immaterial.¹

Assault.—An Assault With a Knife, where prosecutor is cut on the head and neck, is not a simple assault.

APPEAL from Superior Court, Tehama County; John F. Ellison, Judge.

David Davis, convicted of assault with a deadly weapon, appeals. Affirmed.

W. M. Gibson and H. P. Andrews for appellant; L. V. Hitchcock, district attorney, and Attorney General Hart for the people.

BELCHER, C.—The defendant was convicted of an assault with a deadly weapon upon one Charles Schmidt, and this appeal is from the judgment and an order denying his motion for a new trial.

It is contended for appellant that he was prejudiced by the conduct of the district attorney, and by numerous alleged erroneous rulings of the court, during the progress of the trial, and hence that the judgment should be reversed. The matters complained of will be noticed briefly in their order.

¹ Cited and followed in *People v. Brown*, 15 Cal. App. 399, 114 Pac. 1006, a case where a charge of murder had been sought to be met by the plea of self-defense, but the counsel of the person charged would have had the latter, on his examination, testify as to an injury to his head once received by him, as affecting the question of responsibility.

When the juror first called was being examined on his voir dire, he was asked by counsel for defendant if he had any special prejudice against offenses "committed during Sunday broils." The district attorney objected to the question, and remarked: "Nobody broiled but the defendant." It is said that this remark was uncalled for, and tended to prejudice the juror against the defendant. The juror was accepted without challenge; and, conceding that the remark was uncalled for, and should not have been made, still we are unable to see how any prejudice necessarily did result, or could have resulted, therefrom.

Again, when the district attorney was making his opening argument, he read to the jury portions of the instructions of the court; and it is said that, conceding counsel in his argument may read the instructions of the court, still it is improper to read only portions thereof, "and those portions presumably the part bearing most strongly against the defendant; thus emphasizing that portion of the charge of the court most damaging to the defendant." The district attorney had the undoubted right to state to the jury the facts of the case and the law applicable thereto, and it must be presumed that, when he read portions of the charge, he was permitted by the court to do so, and that the portions read were applicable to the facts under discussion, and declared the law correctly. In this we fail to see any misconduct on the part of the attorney, or anything of which the defendant should be heard to complain.

One of the jurors called was a German. On his examination as to his fitness to serve, he was asked by counsel for defendant if he could speak and understand the English language with ease. He answered: "Well, I understand the English pretty well. Can talk it, but I can't write much. Can write a little. I can read pretty well." "Q. Can you always understand what anyone says when they speak in English? A. I would not say I could always. In some cases I don't think I could." Other like questions were asked and answered, and the counsel then challenged the juror upon the ground that, according to his own statement, he did not understand the English language so as to comprehend all that might be said in his hearing. The challenge was denied, and an exception reserved. There was no error in this ruling. It

was for the court to determine as to the qualifications of the juror, and, after seeing him and hearing him talk, it properly concluded, so far as we can see, that he was competent to act.

Another juror, on being called, was asked by counsel for defendant: "Do you think there are cases in which an aged and decrepit man might, on account of his physical infirmity, necessarily have to use a weapon to defend himself, whereas, in the same case, a younger and stouter man might be able to resist whatever force was used without weapons?" An objection that the question was irrelevant and immaterial was sustained, and this ruling is assigned as error. Undoubtedly a case may be supposed where an aged and decrepit man might be justified in using a weapon to defend himself when a young and vigorous man would not be. But to constitute justification in any case, the circumstances shown must be such as are declared by the statute to have that effect; otherwise, neither age nor decrepitude, youth nor vigor, would cut any figure in the case. In this case the law bearing upon the subject in hand was clearly and fully stated by the court to the jury, and we fail to see, therefore, how the defendant could have been prejudiced by the ruling complained of.

The prosecuting witness, Charles Schmidt, was not present at the trial. The district attorney called the under-sheriff of the county, and proved by him that a subpoena for Schmidt was placed in his hands for service more than two weeks before the trial, and that like subpoenas were sent to the sheriffs of the four adjoining counties, with directions to use every effort to find the witness; and that all of the subpoenas had been returned unserved. The said subpoenas, with the returns thereon, were offered in evidence, and the officer was then asked: "What other efforts, if any, have you made toward finding the whereabouts of the witness? A. We have made inquiry of every farmer of any prominence we could see in town, and Corning and Vina, and different parts of the county. Q. All over the county and different parts of it? A. Yes, sir. Q. Have you been able from any and all steps taken by you personally, or by the office, to ascertain and find the whereabouts of the man Chas. Schmidt? A. I have not been able to ascertain anything about where he went." One Grinnell was then called, and testified: "I am official court reporter of Tehama county, California, and was sworn to take

the evidence in the preliminary examination of People v. David Davis. The transcript shown me was the evidence of Chas. Schmidt, taken at said examination. The certificate shown me is my certificate. The evidence taken at that time was taken in shorthand, and written out in longhand by me." Thereupon the evidence of Schmidt given on the preliminary examination of defendant was offered and admitted in evidence, against the objection of defendant that no sufficient foundation for its admission had been laid, and that there was no proper certificate to the reporter's transcript. It is earnestly contended for appellant that the court erred in admitting the offered evidence, for the reason that there was no sufficient showing that the missing witness could not, with due diligence, be found within the state. We do not think this contention should be sustained. It appeared from other evidence given during the trial that the witness had been a laborer on farms in Tehama county for several years. He had disappeared, and we cannot say that the court abused its discretion in holding that due and reasonable diligence had been used to find him.

The objection that no proper certificate was attached by the reporter to the transcript cannot be entertained. The certificate is not set out in the record, and what was its form or character does not appear. If deemed insufficient, it should have been set out; and, not being so, it must be presumed to have been in proper form. The other objections to the transcript are without merit, and do not require special notice.

It was proved that, some ten or twelve years before the trial, defendant received a violent blow on the head, which rendered him unconscious and kept him in bed five or six weeks, and that his physical condition was greatly impaired by the blow. Several witnesses were then called by the defendant to prove that his mental condition was also greatly impaired by the blow. The evidence was objected to as irrelevant and immaterial, and the court held that it was so, unless the plea of insanity was set up. No such plea being interposed, the evidence was excluded and exceptions reserved. It is not claimed that defendant was an idiot or lunatic when he committed the offense charged; and, this being so, the evidence sought to be introduced was clearly immaterial, since he was responsible for his willful acts, whether he was then a strong or weak minded man.

The instructions given to the jury were very full, covering the whole case, and stated the law correctly. The court properly modified one of the instructions asked by defendant. As presented, it was inaccurately drawn, and, as modified and given, it was clearly correct. The failure of the court to instruct the jury that, under the charge made, the defendant might be found guilty of a simple assault, was not error. The charge was an assault with intent to commit murder, and it was proved, without dispute, that defendant made the assault on Schmidt with a knife, and cut him on the head and neck. He was therefore, if guilty at all, guilty of more than a simple assault: *People v. Madden*, 76 Cal. 521, 18 Pac. 402; *People v. Scott*, 93 Cal. 516, 29 Pac. 123. The instructions asked by the district attorney, to which objection is made, have been given and approved in many cases, and do not require further discussion. See *People v. Bruggy*, 93 Cal. 483, 29 Pac. 26, where the authorities are reviewed.

Looking at the whole case, we find no prejudicial error, and therefore advise that the judgment and order be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

NATOMA WATER & MIN. CO. v. HANCOCK et al.

No. 14,624; March 13, 1894.

36 Pac. 100.

Contempt.—No Appeal Lies from an Order Adjudging one guilty of contempt for violating a restraining order.

APPEAL from Superior Court, Sacramento County; John W. Armstrong, Judge.

Action by the Natoma Water and Mining Company against John Hancock and Joseph Wild. An order was granted restraining defendants from doing certain things pending the

litigation. From an order adjudging defendant Wild guilty of contempt for violating this order, he appeals. Appeal dismissed.

S. Solon Holl for appellant; Daniel Titus for respondent.

HAYNES, C.—This is an appeal from an order adjudging the defendant Joseph Wild guilty of a contempt of court, and imposing a fine of \$250 therefor. Upon the complaint filed by the plaintiff at the commencement of the above-entitled action an order was granted requiring the defendants to show cause, at a day named, why they should not be enjoined pending the litigation, or until the further order of the court, from doing certain things in the order mentioned; “and that, in the meantime, and until this order to show cause be heard and determined, the defendants be restrained,” etc. It was for an alleged violation of this restraining order that appellant was adjudged guilty of contempt. A bill of exceptions was taken, and several errors of law and specifications wherein the evidence is insufficient to justify the decision appear therein. But these alleged errors cannot be examined, as the order is not appealable: See Code Civ. Proc., sec. 1222; *Tyler v. Connolly*, 65 Cal. 28, 2 Pac. 414; *Sanchez v. Neuman*, 70 Cal. 210, 11 Pac. 645; *In re Vance*, 88 Cal. 262, 26 Pac. 101; *Ex parte Clancy*, 90 Cal. 556, 27 Pac. 411. If the restraining order was invalid and without force for the want of an undertaking (a point not necessary to consider here), defendants had a remedy by motion to vacate it, or by appeal from an order refusing to vacate it. The court below had jurisdiction to determine that question in this proceeding, but, as an appeal from that order does not lie, this court has no jurisdiction to correct any errors of law or fact it may have committed. The appeal should be dismissed.

We concur: Temple, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the appeal herein is dismissed.

BULLION & EXCHANGE BANK OF CARSON CITY v.
SPOONER et ux.

No. 18,192; March 14, 1894.

36 Pac. 121.

Mortgages—Foreclosure—Maturity of Debt.—When an Overdraft Account with a bank is secured by a note and mortgages payable on or before three years, and interest as due is charged in the account, the rules against parol evidence (Civ. Code, sec. 1625; Code Civ. Proc., sec. 1856) forbid proof of an oral agreement that the debt should be due at any time within the three years, at the bank's option.

APPEAL from Superior Court, Lassen County; W. T. Masten, Judge.

Action by the Bullion & Exchange Bank of Carson City against M. E. Spooner and Clara, his wife, to foreclose mortgages. Judgment for defendants. Plaintiff appeals. Affirmed.

Goodwin & Dodge and Trenmor Coffin for appellant; A. L. Shinn for respondents.

BELCHER, C.—In 1890 the plaintiff was a corporation engaged in the business of banking at Carson City, in the state of Nevada. The defendant M. E. Spooner did business with the plaintiff, and on December 27, 1890, was indebted to it in the sum of \$14,240.79, on an overdraft account. On that day he executed to the plaintiff a deed, absolute in form, of certain real property situated in Ash valley, Lassen county, California, and known as the "Spooner Ranch"; and at the same time he also executed to the plaintiff his promissory note for \$20,000, payable "on or before three years after date," with interest, payable monthly, at the rate of nine per cent per annum from date until paid, and a chattel mortgage, to secure payment of the note, on certain personal property situated in said Ash valley, and described as two hundred head of horses, more or less, including three thoroughbred stallions, and six hundred head of cattle, more or less, with all the increase of such horses and cattle. The mortgage provided "that, if the

mortgagor shall fail to make any payment as in the said promissory note provided, then the mortgagee may take possession of said property, using all the necessary force so to do, and may immediately proceed to sell the same in the manner provided by law," etc. These papers were all parts of one transaction, and were made to secure payment to the plaintiff of the said overdraft account. The deed and mortgage were thereafter, on January 9, 1891, duly recorded in the recorder's office of Lassen county. At the time of the execution of the above-mentioned papers, the plaintiff also executed to the defendant its written obligation to reconvey to him, "on or before the twenty-seventh day of December, A. D. 1893," all of the real property described in the said deed, provided the defendant shall, on or before the day named, have paid to the plaintiff the sum of \$20,000, according to the terms and conditions of the said promissory note, a copy of which was set out in the undertaking. Thereafter the amount due on the overdraft account was carried forward in the general bank account of defendant, and from time to time up to October 1, 1892, defendant deposited with and paid to plaintiff various sums of money, aggregating, as the court below found, \$64,046.83, which sums were credited generally upon said account. The defendant drew checks against the money so deposited, and his checks were paid up to the fall of 1892, when the plaintiff refused to pay any further drafts. Meantime, the plaintiff had computed interest monthly, at the rate of nine per cent per annum, on the amount due it, and had charged the same in the account. At the time of the commencement of the action, the amount claimed by plaintiff to be due on the account was \$12,146.50. On the 12th of August, 1892, the plaintiff and defendant agreed upon and designated in writing one James Marshall as a pledge-holder to go to Ash valley, and to immediately take possession of and hold all the personal property mentioned in the said chattel mortgage as security for the payment of the said indebtedness. Afterward, the plaintiff, claiming that the value of the property which it held as security was insufficient to secure the balance due on the said account, and that defendant had fraudulently misrepresented the value of the property at the time of executing the deed and chattel mortgage as aforesaid, demanded of defendant that he give further security; and, this demand

being refused, it commenced this action, on October 25, 1892, to foreclose its lien upon all of the real and personal property covered by the said deed and chattel mortgage.

One of the issues raised by the answer was as to whether the indebtedness from defendant to plaintiff was due at the time the complaint was filed; and upon this issue the court found "that it was not agreed nor intended that the principal sum of said indebtedness from said defendant M. E. Spooner to plaintiff should be paid whenever demanded by plaintiff, but it was agreed that said indebtedness should be paid on or before the twenty-seventh day of December, 1893, at the option of the said defendant M. E. Spooner; and the said indebtedness is not due, nor any part thereof." And as a conclusion of law the court found "that no cause of action exists for the recovery of the indebtedness from the defendant M. E. Spooner to plaintiff, nor for the foreclosure of any mortgage lien or security given to secure said indebtedness, and that plaintiff is not entitled to any judgment for said indebtedness, nor to any decree foreclosing any liens upon, or for the sale of any of, the property described in the complaint." Upon this branch of the case, judgment was accordingly entered in favor of the defendant, from which the plaintiff appeals.

Whether or not the finding above quoted was justified by the evidence is the principal question in the case. In our opinion, the finding was justified, and must be held controlling as to all other questions presented by the record. It is not controverted that the deed, agreement to reconvey, note and chattel mortgage were all parts of one transaction, and were intended by the parties to operate simply and solely as security for the payment of defendant's overdraft account. These papers are, therefore, to be read together as one instrument; and when so read they express, in clear and unmistakable terms, the time when that indebtedness was to become due and collectible, namely, on December 27, 1893. Section 1856 of the Code of Civil Procedure provides: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms"; and that, as between the parties, there can be no other evidence of the terms of the agreement, except in certain cases, of which this is not one. And section 1625 of the Civil Code provides: "The execution of a contract in writing, whether

the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Under the circumstances shown, the plaintiff was not entitled to prove that it was orally agreed that the debt should be due and collectible at any time at its option, and the court did not err in excluding the evidence offered upon that subject: *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. 225. Section 2999 of the Civil Code has no bearing on the case. That section refers solely to a case where a debtor has obtained credit or an extension of time by a fraudulent misrepresentation of the value of property pledged. There is no evidence here that at the time defendant obtained credit, or at the time he obtained the extension of time to pay his debt, he made any fraudulent misrepresentation as to the value of his property; nor does it appear that at that time he made any pledge of property.

The other points discussed by counsel for appellant do not require special notice, for, conceding that the court erred in its rulings, as claimed, the errors were harmless. Where the record shows that the appellant is not entitled to recover in any event, error in the rulings of the court upon the admission of evidence cannot entitle him to a reversal of the judgment: *McPhail v. Buell*, 87 Cal. 115, 25 Pac. 266. And where evidence, admitted against objection, relates only to an issue which is rendered immaterial by the evidence and findings upon other issues, which are decisive of the case, any error in its admission is harmless, and is not ground for reversal of the judgment: *Clavey v. Lord*, 87 Cal. 413, 25 Pac. 493. So, the failure to find any fact, or an erroneous finding of any fact, unless the finding, if correctly made, would change the judgment, is immaterial: *Dedmon v. Moffitt*, 89 Cal. 211, 26 Pac. 800. It follows that the action was prematurely brought, and the judgment should be affirmed.

We concur: Temple, C.; Vanelief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

CHADBOURNE et al. v. STOCKTON SAV. & LOAN
SOCIETY.

No. 18,173; March 14, 1894.

36 Pac. 127.

Execution—Interest of Possible Vendee.—One to whom an offer for the sale of land is made—the offer to be kept open only on certain conditions—has not, in the absence both of a compliance with such conditions and an acceptance of the offer, an interest in the land, which is subject to sale on execution.

Bank—Authority of President as to Land Contract.—In the absence of authority by charter, resolution, or by-law, it will not be presumed that the president of a bank is authorized to waive conditions of a contract for the sale of land.

APPEAL from Superior Court, San Joaquin County; Ansel Smith, Judge.

Action by Joshua Chadbourne and others against the Stockton Savings and Loan Society. From a judgment for plaintiff, and an order denying motion for new trial, defendant appeals. Reversed.

Baldwin & Campbell and James H. Budd for appellant; J. B. Webster and L. W. Elliott for respondents.

TEMPLE, C.—This is an appeal by defendant from the judgment and an order refusing a new trial. The case has been here before, and is reported: 88 Cal. 636, 26 Pac. 529. The action is based upon an offer on the part of the defendant to sell certain land, which offer is set out in full in the report of the last appeal. On that appeal it was held that the complaint was defective, and that a demurrer interposed to it should have been sustained, because, it is said, the offer had not been accepted within a reasonable time, nor was there any excuse shown for delay. It is then said: "As there is no allegation in the complaint showing that the agreement of Hart to keep the buildings insured, and to assign to the defendant the policies of insurance, as provided by the terms of said instrument—which was the only consideration of the offer

to sell—was ever performed or excused, we advise that the judgment and order be reversed, with directions to the court below to sustain the demurrer.” The judgment was reversed, therefore, partly because it was not averred that Hart had insured the buildings. The point was certainly presented by the demurrer. It now appears in the proof that the buildings were not insured by Hart or anyone else. Respondents say the agreement to insure was not a condition precedent. If it was not, it had no binding force whatever. The writing was merely an offer to sell, and imposed no obligation upon Hart. He simply could not avail himself of the offer unless he complied with the conditions. But, whether right or wrong, since the facts in reference to this matter are precisely as they appeared to be on the last appeal, the conclusion has become the law of the case. The offer of William Hart was contemporaneous with a demise of the premises, and was attached to the lease. The lease, however, was not to William Hart, nor is it shown in any way that William Hart had any previous relation to the premises, or any interest in the leasehold estate, or control over the tenants. It does not appear, therefore, that he had an insurable interest in the buildings. He must have procured the insurance, if at all, in the name of the defendant. Furthermore, the offer was conditioned that the first year’s rent should be paid by August 16, 1888. Hart was not liable for such payment, so far as appears. This rent was not paid at that time. While it was in default, an execution was sued out at the instance of a creditor of William Hart, and levied upon the land, and the interest of said Hart in the same was sold as real estate.

It is claimed and admitted that defendant, through its president, at the sale under the execution, forbade the sale, and notified those intending to bid that William Hart had no interest in the premises, because the conditions upon which the offer was made had not been complied with. Nevertheless, plaintiff’s grantors bought in the premises, and plaintiffs are not the assignees of William Hart, as to his interest in the offer to sell, unless they acquired such interest through such sale. It is evident that the conditions upon which such offer was made did not transpire, and there would seem to be no doubt that the defendant was thereby relieved of its obligation to keep the offer open. Subsequently, however, to the execu-

tion sale, the rent was paid and accepted. Now, Hart had no interest in the premises, was not in possession, and had expended no money because of the option. He had not accepted the offer, and has never done so. After plaintiffs received their deed from the sheriff, six months after the sale, they tendered to defendant the money for the land, which tender was refused. In its answer, defendant denies that it made the offer to Hart, or that Hart accepted any such offer, or acquired or had any interest in the premises, or that plaintiffs have acquired the rights of Hart under said option. It admits the payment of rent, but avers that the rent was paid long after August 16, 1888. It avers that the buildings were not insured, and denies that the defendant ever waived that condition of the option. It also denies that defendant ever agreed to convey the land, notwithstanding the failure of Hart or of plaintiffs to comply with its conditions. There is evidence tending to show that, soon after plaintiffs received the sheriff's deed to the land, they called upon Shippee, the president of the defendant corporation, and proposed to complete the purchase according to the offer; that Shippee replied that, when they purchased, Hart had no interest in the land, because the rents had not been paid, but since then the rents had been paid, and Hart had an interest, and the bank would convey it to plaintiffs, if Hart's son, to whom he understood Hart had assigned his right, did not wish to purchase, and that it would be necessary to wait till the time was up, when, if no one else claimed the privilege, he would be glad to accept the plaintiffs' offer; that afterward, when the time was about to expire, and plaintiffs made the formal tender, it was declined solely because Hart was still claiming the right, and had also made a tender, and Shippee said the courts must settle the question as to who had the better right. If it be conceded that Shippee, in making these statements, acted for the corporation, they do not prove a waiver of the conditions of the offer. It must be remembered that there was no contract of purchase. Hart was not in possession, and had no interest in the property, save such as he acquired under the offer. That was conditioned, and, so far as payments of rent are concerned, not upon any performance or default on the part of Hart. Payment of rent was an indifferent circumstance, except as made material by the terms of the offer mak-

ing it a condition. There was no forfeiture of an estate in land. It was merely that the event did not happen upon which the offer was conditioned. That being so, plaintiffs acquired nothing by their execution sale. If the corporation was still willing to convey, it was not in pursuance of the offer, which by its own terms was no longer open, but because it was still ready to sell for the price named. It is not necessary to determine whether a mere offer to sell land, while it is unaccepted, constitutes an interest in the land, which will pass under an execution sale. There was here no such offer outstanding when the sale was made. But it was not shown that Shippee had any authority to bind the corporation by such waiver, conceding that such waiver could have been made. It was not shown that he had such authority, as president, through a by-law or by resolution, nor that he had been accustomed to transact such business, and that his authority to do similar acts had been recognized by the directors. The authorities are agreed that, as president, he had no such authority, unless it is so ordained in the charter, by-laws, or by resolution. It has sometimes been held, however, that, when the president assumes to act for the corporation in a matter pertaining to the usual business of the corporation, authority will be presumed, in the absence of proof. This was a transaction for the sale of land, and such corporations are prohibited from dealing in land, except within quite narrow limits. It may be true that, when they do violate the law in this respect, no one can object, or take advantage of the fact, except the state. Still, such prohibited business cannot be held to be the customary business of the bank, and authority will not be presumed in the president merely by virtue of this office. I recommend that the judgment and order be reversed and a new trial had.

We concur : Haynes, C. ; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial granted.

SPOONER v. CADY.

No. 18,191; March 15, 1894.

36 Pac. 104.

A Pleading may be Amended Without Leave of court under Code of Civil Procedure, section 472, providing that any pleading may be amended once as of course and without costs.¹

An Amended Pleading Which is Stricken Out on motion does not supersede the original.²

APPEAL from Superior Court, Lassen County.

Action by Clara Spooner against Frank P. Cady in claim and delivery. Plaintiff had judgment by default, from which, and from an order overruling a motion to set aside the default, defendant appeals. Reversed.

Goodwin & Dodge and Trenmor Coffin for appellant; A. L. Shinn for respondent.

SEARLS, C.—This is an action in claim and delivery. Plaintiff had judgment, from which and from an order of the court made after final judgment, refusing a motion to set aside the default of defendant and the judgment rendered thereon, defendant appeals. The action was commenced October 3, 1892. On the thirteenth day of the same month defendant filed a demurrer to the complaint and answer. The demurrer was overruled, but at what date does not appear. On December 15, 1892, defendant served and filed an amended answer, which was not verified, and was filed without any leave of court first had or obtained. Plaintiff moved to strike out the amended answer upon the grounds that it was filed

¹ Cited and followed in *Dunbar v. Griffiths*, 14 Idaho, 124, 193 Pac. 655, the court adding, in effect, however, that the privilege could be exercised only within the statutory time for filing the pleading, unless by leave of court.

² Cited and followed in *Wapello State Savings Bank v. Colton*, 143 Iowa, 369, 122 N. W. 153, the court saying that by the striking of an amended petition from the files, the petition in its original shape is restored.

without permission of the court; without notice to plaintiff's attorneys; that it was not verified, and that it did not state facts sufficient to constitute a cause of action. The motion was heard December 23, 1892. At the hearing, defendant asked leave to verify the amended answer, and in support thereof filed an affidavit showing, as cause for want of verification when filed, that defendant was absent from the county on official business, and his attorney was desirous of at once notifying plaintiff's counsel of the contents of the proposed answer before preparations should be made for trial of the cause, etc. Defendant was sheriff of the county of Lassen, and, as one of the defenses of the original answer, an attempt was made, although a defective one, to justify the taking of the personal property in question by virtue of two certain writs of attachment. The attempt of the amended answer was to make a more full and specific defense than that contained in the original answer. The court below denied the application of defendant to verify the amended answer, struck the same out, and ordered judgment in favor of plaintiff, which was entered.

The court erred in its rulings. Under section 472 of the Code of Civil Procedure, "any pleading may be amended once by the party, of course and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading." Any pleading which may be amended, once of course and without costs, may be so amended without application to the court or permission therefrom. It is a right conferred upon parties equally with that of pleading originally; a right which the court cannot take from a party to an action. It must be exercised within the time and in the manner specified in the code, and is quite distinct from the numerous cases in which amendments to pleadings can only be made by leave of the court. The question whether an amendment to an answer as of course must be made within the ten days given to demur thereto, where no demurrer has in fact been interposed, or whether in such a case it may be made at any time before trial, is an important one, and, as its decision is not necessary to the disposition of the present

appeal, no opinion is expressed upon the question. The court treated the filing of the amended answer without leave as being improperly filed, and gave this as a reason for striking it out. Having stricken it out, it went further, and held that this amended answer had superseded the original answer, and hence that when it was stricken out there was no pleading on file on behalf of defendant, and gave judgment against him. It is true that "an amended pleading supersedes the original," but this must be taken with the limitation that, to perform that office or function, the amended pleading must be a valid, subsisting pleading, entitled to recognition as such, and legitimately in the place and stead of that which it supersedes. If it is a usurper, with no right to live or be of record, and only exists until the court can strike it out of existence because it was void ab initio, it fills no such office, and we cannot subscribe to the logic which treats a pleading as void because filed without leave of the court, and in the same breath asserts it to be valid and subsisting as a substitute for the original pleading. It follows that the court erred in entering judgment in favor of plaintiff, and against the defendant, with the original answer in the same cause standing of record, which answer, though defective, presented issues without the trial of which plaintiff was not entitled to judgment. Like considerations apply to the ruling made after judgment on the motion to set the same aside. The judgment and order appealed from should be reversed, with leave to the defendant, and respondent here, to amend his answer if he shall be so advised.

We concur: Haynes, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, with leave to the defendant, and respondent here, to amend his answer if he shall be so advised.

CHRISTENSEN v. McBRIDE.

No. 18,182; March 24, 1894.

36 Pac. 398.

Appeal.—Findings of Fact cannot be Reviewed on conflicting evidence.

New Trial.—Newly Discovered Evidence, Which is Merely cumulative, is no ground for a new trial.

APPEAL from Superior Court, San Joaquin County; Ansel Smith, Judge.

Action by one Christensen against one McBride. Judgment for plaintiff. Defendant appeals. Affirmed.

James H. Budd and John E. Budd for appellant; F. T. Baldwin, R. D. Baldwin and Nicol & Orr for respondent.

PER CURIAM.—The principal point upon which appellant relies is that the evidence does not support the findings. We have carefully examined the testimony of the witnesses, and find a sharp conflict on all material questions. Under the well-settled rule, therefore, the findings cannot be disturbed. Whatever transactions the parties may have had prior thereto, the court evidently believed, and so found upon sufficient evidence, that on the first day of April, 1891, after a consideration of the items of their accounts, they agreed that the defendant was owing the plaintiff \$2.260, and that plaintiff was indebted to the defendant in the sum of \$200. It is claimed that as the court found plaintiff was to pay the defendant for his board at the rate of four dollars per week, and as he had boarded with the defendant seventy-eight weeks, the defendant ought to have been allowed a credit of \$312 instead of \$200. This claim is based upon the assumption that the plaintiff boarded with the defendant continuously from October 1, 1889, to April 1, 1891; but the plaintiff testified that he had "been boarding in his family a portion of the time." The court doubtless believed that some allowance had been made on account of plaintiff's absence, and that the parties had agreed, as testified by the plaintiff, to allow the de-

fendant \$200. The findings with respect to the defendant's counterclaim for use and occupation, and other affirmative matters, are as broad as the averments of the complaint, and are therefore sufficient. The affidavits filed on motion for a new trial set forth matters of evidence which are merely cumulative, and were properly disregarded by the court. Judgment and order affirmed.

JACOB v. CARTER.

No. 18,214; March 26, 1894.

36 Pac. 381.

Ejectment—Defenses—Pleading and Proof.—Where, in ejectment, the complaint merely alleges plaintiff's ownership and right to possession, and that defendant is in possession, and refuses to surrender the same, and the answer denies the ownership and right to possession, defendant may prove any facts showing that plaintiff had no right of entry or possession when the action was commenced.

Ejectment—Defense of Possession Under Contract of Purchase. Where, in ejectment, the defense is possession under contract of purchase, indebtedness of plaintiff to defendant for salary and money paid in excess of the payments required may be considered as a performance of the contract, under Code of Civil Procedure, section 440, which provides that, where cross-demands have existed between persons under such circumstances that, if one sued the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other.

A New Trial may be Granted as to the Issues raised by a cross-complaint without granting one as to those raised by the complaint and answer.¹

APPEAL from Superior Court, Tulare County; Wheaton A. Kent, Judge.

¹ Cited with approval in *Spawn v. South Dakota Cent. Ry. Co.*, 26 S. D. 3, Ann. Cas. 1912D, 980, 127 N. W. 649, along with other cases the court summing them all up in this language: "It seems to be generally held that, where there are distinct counts and causes of action and cross-complaints and counterclaims, all tried in the same case, a new trial may be granted as to part only and denied as to others."

Action by Elias Jacob against D. F. Carter. From a judgment for defendant, plaintiff appeals. Affirmed.

Bradley & Farnsworth for appellants; Daggett & Adams for respondent.

VANCLIEF, C.—Action of ejectment to recover a tract of land in Tulare county. The complaint alleges, generally, the plaintiff's ownership and right of possession, and that defendant was in possession, and refused to surrender possession to plaintiff on demand therefor. The answer denies plaintiff's title and his right to possession, and avers defendant's right of possession. The defendant also filed a cross-complaint, in which he alleged that on October 18, 1888, the plaintiff and defendant entered into a written agreement, whereby plaintiff agreed to sell, and the defendant to purchase, the land in controversy, at the price of \$2,500, upon which \$250 was paid and credited at the date of the contract, and whereby it was agreed that the balance of the principal should be payable on or before October 18, 1893, with interest at eight per cent per annum, payable annually in advance on or before October 18th of each year, and, if not punctually so paid, then the said party of the first part "shall have the right to enter upon and take possession of said premises, with all the improvements thereon"; that from the date of said agreement until May 4, 1890, the defendant was in the employ of plaintiff as general agent at a salary of \$50 per month, and during that period paid and expended money for the plaintiff, and boarded his employees, for which plaintiff agreed to compensate him, over and above said salary; and that it was understood and agreed, at the date of said written agreement, that plaintiff should credit said salary and all other indebtedness of plaintiff to defendant for money paid and for board of employees which might accrue, as payments on the purchase price of said land; and that on May 4, 1890, plaintiff and defendant had a settlement, upon which it was found and agreed that the land had been fully paid for, and that plaintiff would make defendant a deed therefor, as soon as he received a deed for the same from the Southern Pacific Railroad Company, which, it is averred, he has received since the date of said settlement. Upon these facts the defendant, by his cross-

complaint, seeks to enforce a conveyance of the land from plaintiff to himself. Plaintiff, in answer to the cross-complaint, denied all the averments thereof, except that he had received a deed from the railroad company since the date of the alleged settlement. By agreement of the parties all the issues raised by the complaint and answer thereto and by the cross-complaint and answer thereto were tried together by the court and a jury, it being agreed that the jury should render a general verdict upon the issues raised by the complaint and answer thereto, and a special verdict upon such of the issues raised by the cross-complaint and answer thereto as might be submitted by the court. The verdict of the jury, both on the general issue and on the special issues submitted, was in favor of the defendant. The court adopted the verdict on the special issues, and made some additional findings upon issues in the cross-suit, and rendered judgment in favor of defendant upon the whole case, including a decree that plaintiff convey the land in question to defendant. The plaintiff moved for a new trial, which was denied as to the issues arising on plaintiff's complaint and the answer thereto, but granted upon the issues in the cross-suit. The plaintiff appeals from the judgment, and from an order denying his motion for new trial upon the issues raised by his complaint and the answer thereto.

1. There can be no doubt as to the power of the court to refuse to disturb the general verdict upon the issues raised by the complaint and answer thereto, and, at the same time, to grant a new trial as to the equity part of the case: *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437, and cases cited. The cross-suit is distinct from the action of ejectment, and might have been separately tried; but, since the plaintiff expressly stipulated that the two actions should be tried together, as they were, he would not be heard to object, and cannot be allowed any advantage on this ground; nor have his counsel made any such point.

2. The order denying a new trial in the ejectment suit is not, as contended by appellant, inconsistent with the order granting a new trial in the cross-suit. The complaint is extremely general, alleging merely plaintiff's ownership and right of possession, and that defendant wrongfully withholds the possession; and the answer of the defendant is quite as

general. It denies plaintiff's ownership, and his alleged right of possession, and affirmatively avers "that on the eighteenth day of October, 1888, he was, and that he ever since has been, and that he still is, entitled to the possession of all the real property described in said complaint." Under this answer defendant was entitled to prove any facts showing that plaintiff had no right of entry or possession at the time the action was commenced (*Semple v. Cook*, 50 Cal. 29; *Roberts v. Columbet*, 63 Cal. 22); and, even if this were not so, I think those facts alleged in the cross-complaint which constitute a defense to the action at law, if proved, might have been properly considered as such defense, whether sufficient to entitle defendant to equitable relief or not; namely, the alleged facts that defendant was in possession by plaintiff's consent, under a contract to purchase which defendant had fully performed on his part, up to the time of the commencement of the action of ejectment: *Meeker v. Dalton*, 75 Cal. 154, 16 Pac. 764. The evidence, though conflicting, is amply sufficient to justify a finding by the jury that the indebtedness of plaintiff to defendant for money paid and for salary accrued prior to the commencement of the action more than equaled the interest on the purchase money and the taxes on the land up to that time; and if not, technical payment of such interest and taxes was more than compensation therefor, by the effect of section 440 of the Code of Civil Procedure, which provides: "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by assignment or death of the other." The only default on the part of defendant claimed by counsel for appellant is the failure to pay \$360 interest on the purchase money which had become due before the commencement of the action, for they admit that, by the true construction of the contract, the principal was not to be paid until October 18, 1893. but insist that the interest was to be paid on or before October 18th of each year, and, if not so paid, the plaintiff was entitled to the possession. Therefore, the evidence being sufficient to justify the jury in finding that the \$360 interest had been paid or compensated before the commencement of the action, a new

trial of the action of ejectment was properly denied. At the same time the evidence may not have been sufficient to justify a finding that the principal of the purchase money had been fully paid, or a finding of the settlement alleged to have been made on May 4, 1890; and, if such was the case, a new trial of the cross-suit was properly granted. But whether properly or not is immaterial, as there is no appeal from the order granting a new trial. It is considered only so far as necessary to show that it is not inconsistent with the order denying a new trial of action of ejectment. I think the judgment and order should be affirmed.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

CLARKSON v. HOYT.

No. 14,716; March 26, 1894.

36 Pac. 382.

Action on Note—Accounts—Reference.—In an Action on a Note given for services for managing defendant's cattle ranch, where plaintiff simply introduced his note and rested his case, defendant's motion thereupon to have the court appoint a referee under Code of Civil Procedure, section 639, subsection 1, providing that, when an issue of fact requires the examination of a long account, the court may appoint a referee to decide the issue, was properly denied, the note implying a settlement of the account between the parties, and it not then appearing that the examination of a long account was necessary.

Action on Note—Account—Amendment of Answer.—In an action on a note given to settle a balance found due on a statement of accounts, the overruling of defendant's motion to amend his answer so as to attack the statement of accounts on the ground of fraud is not an abuse of discretion where the proposed amendment alleges the fraud only in general terms, without pointing out the facts which constitute it.

Action on Note—Defenses.—In an Action on a Note Given for a Balance found due on a settlement of accounts, where defendant failed to allege fraud in the account, his offer to show that plaintiff received money as his agent, for which he failed to account, was properly overruled.

APPEAL from Superior Court, Siskiyou County; Edward Sweeny, Judge.

Action by James F. Clarkson against Perry Hoyt on a promissory note. From a judgment for plaintiff and order denying defendant's motion for a new trial, defendant appeals. Affirmed.

H. B. Warren and Mesick & Maxwell for appellant; John V. Brown and H. B. Gillis for respondent.

BELCHER, C.—This is an action to recover the amount due on a promissory note for \$1,969, given by defendant to plaintiff, and dated "Lakeview, Or., May 25, 1888."

The material parts of the answer are as follows: It is alleged that in 1880 defendant was a resident in Siskiyou county, California, and was the owner of two fully equipped stock ranches in Lake county, Oregon, and also of a large number of cattle, horses, mares and mules, and was then engaged in the business of stock-raising in that county and state; that in September, 1880, he employed the plaintiff, at an agreed salary of \$40 per month, to take the sole care, management and control of all said real and personal property in Oregon, as the agent of defendant, and in his name and for his benefit to conduct the business of raising, caring for, and managing the stock of cattle, horses, and mules aforesaid, and to preserve and keep in good repair the said ranches, machinery, and all appliances used in said business, to purchase all necessary supplies and hire all necessary labor that should be required in conducting the said business, and to market, from time to time, as the same should become salable, said cattle, horses, and mules; that, pursuant to such employment, the plaintiff, on September 15, 1880, received into his possession, and took the entire and sole control, care and management of said real and personal property, and thereafter continued to have and exercise such control, care and management until December 15, 1888, when he resigned his position; that from time to time

during his employment plaintiff informed defendant that he did not wish to draw all of his salary, but preferred to leave the same in defendant's hands, drawing interest at the rate of seven per cent per annum, and that a portion of his salary did remain in defendant's hands until the 25th of May, 1888; that on said last-mentioned day, and while defendant was temporarily on a visit to plaintiff at Lakeview, Oregon, plaintiff demanded of defendant a settlement of all of his salary then unpaid, and defendant, then believing that he had faithfully discharged his duties as agent, and upon his representation that the full amount of \$1,969 was due him on account of his salary and interest thereon to that date, executed and delivered to him the promissory note sued upon; "that said promissory note was so executed and delivered without any accounting or settlement between plaintiff and defendant as to the general business of plaintiff's said agency, and under the said representations by plaintiff to defendant that his said business was all in good condition, and under the belief by defendant that all of plaintiff's said representations were true"; that early in the summer of 1888, and after the execution of the said note, defendant commenced to investigate the true condition of his said property and business, and upon such investigation he for the first time learned that all of plaintiff's statements and representations were false, and "that the plaintiff had fraudulently and in violation of his said trust spent large sums of money belonging to the defendant for matters and things personal to himself, and entirely foreign to the necessary management and care of defendant's said property and business, and that he had from time to time sold and otherwise disposed of a large number of defendant's said cattle, horses and mules, and rendered no account whatever thereof to the defendant, nor paid to defendant any of the profits of said sales"; that at the time of the execution of the said note the defendant was not indebted to the plaintiff in the sum named therein, or in any other sum or amount whatever, for salary due plaintiff, or the interest thereon, or otherwise, but that, on the contrary, the plaintiff was then, and now is, indebted to the defendant in the sum of fully \$6,000; and that the said note was made, executed, and delivered as aforesaid without any consideration whatever. And the prayer was that plaintiff take nothing by his action. The

court below found against the defendant upon all the issues raised, and rendered judgment in favor of the plaintiff according to the prayer of his complaint, from which, and from an order denying his motion for a new trial, defendant appeals.

When the plaintiff had introduced in evidence his note and rested his case, the defendant moved the court to appoint a referee to take and report an accounting between plaintiff and defendant. The plaintiff objected, upon the ground, among others, that the parties had settled their accounts in full up to the date of the note, and the note was given for the balance then found due. The court denied the motion, and held that it was premature at that stage of the case; that under section 639, subsection 1, Code of Civil Procedure, a referee should not be appointed until it is made to appear that there is an issue of fact which requires the examination of a long account; and, also, that the execution of the note by defendant to plaintiff implied a settlement at that time. This ruling is assigned as error, but we think it clearly correct. The defendant was then called and sworn as a witness in his own behalf. It appears from his testimony that there were three settlements between the parties—one in November, 1883, one in October, 1885, and one in May, 1888—and that in making the last settlement plaintiff and defendant spent about a week in going over and examining all plaintiff's accounts concerning his agency business; that, as a result of such examination, a balance of \$1,969 was found due from defendant to plaintiff, for which the note in suit was then given; and that defendant then understood that the accounting was full and complete. At the conclusion of defendant's testimony, he renewed his motion for the appointment of a referee. The plaintiff again objected, and the court denied the motion, holding that it could not be granted under the pleadings as they then stood. The court said "that defendant, having alleged that there had been no account stated, embracing the matters intrusted to plaintiff as agent, which allegation set forth in the answer is deemed in law to be denied, might have an accounting of those matters, if such allegation should be found to be true. But the evidence introduced by the defendant, pertinent to said matter, conclusively shows that there was an account stated, embracing the agency business, as well as plaintiff's claim for wages, that there was a balance struck, and that

defendant gave the note sued on for the exact amount of such balance, whereby he promised to pay it." There was obviously no error in this ruling. Thereafter the defendant moved the court for leave to amend his answer by striking out the part thereof which alleged that the said note was executed and delivered without any accounting or settlement between plaintiff and defendant as to the general business of plaintiff's said agency, and by inserting the following: "That settlements between these parties plaintiff and defendant in regard to the transactions of plaintiff's agency were had as follows: One about October 1, 1883, the next about October 1, 1885, and the last one about May 25, 1888. That defendant kept no books of account of the transactions of plaintiff's agency, and that said settlements were made upon such books and papers as plaintiff produced at such settlements, and that plaintiff at such settlements stated to defendant that such books and papers so presented by him at such settlements contained all the items of accounts of receipts and expenditures touching his transactions as such agent. That defendant shortly after said last-mentioned settlement, ascertained that the said statements of plaintiff were false, and that plaintiff's books of account and papers so presented at said settlement, and upon which said settlements were had and made, did not contain a full and complete statement of the items of such receipts and expenditures, and that plaintiff had received large amounts of money as herein stated, and which did not appear on plaintiff's said books or other papers at the times of such settlements, and of which defendant at such time and times had no knowledge, and that plaintiff had charged this defendant with large sums of money in said settlements, which were never received by said defendant, and of which defendant at such time and times had no knowledge."

The plaintiff objected to the amendment on the ground, in substance, that it admitted that there were three settled and stated accounts between the parties, the last settlement resulting in the giving the note sued on, and that, while it attempted to set up fraud on the part of the plaintiff for the purpose of having the account opened and re-examined, it failed to state the facts constituting the fraud specifically or sufficiently, but charged it only in general terms. The court sustained the objection, and this ruling is also assigned as error. The code

provides that "the court may likewise in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding": Code Civ. Proc., sec. 473. Applications to amend pleadings are addressed to the discretion of the trial court, and, while that discretion should be liberally and freely exercised to effect the ends of justice, orders granting or refusing such applications will not be disturbed on appeal unless it appears that the court abused its discretion: *Emerie v. Alvarado*, 90 Cal. 448, 27 Pac. 356; *Wixon v. Devine*, 91 Cal. 477, 27 Pac. 777. An account stated may be impeached for fraud or mistake (*Green v. Thornton*, 96 Cal. 67, 30 Pac. 965), but the burden is upon the party seeking to impeach it to set out in his pleading the particular facts constituting the fraud or mistake relied on. "It is not sufficient to aver fraud in general terms; the facts constituting the fraud must be alleged. This is held in many cases decided by this court. This course of decision commenced at an early date in this state": *Spring Valley Waterworks v. City of San Francisco*, 82 Cal. 321, 16 Am. St. Rep. 116, 22 Pac. 910, 1046, and see cases cited. "In defense to an action on a promissory note, it is not sufficient to plead in general terms want of consideration, and that the note was obtained by fraud. The answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud": *Gushee v. Leavitt*, 5 Cal. 160, 63 Am. Dec. 116. Here the offered amendment fails to point out particularly the facts constituting the alleged fraud of the plaintiff. It charges that the plaintiff, at the time of the settlements, made statements that the books and papers presented by him contained all the items of accounts of receipts and expenditures touching his transactions as such agent, and that defendant shortly after the last settlement ascertained that these statements were false, but it wholly fails to point out wherein or in what particulars they were false. It also charges that plaintiff had received large amounts of money which did not appear in his books or papers, and of which defendant at that time had no knowledge, but it does not say what amounts, or when or from what source they were received. It also charges that plaintiff had charged defendant with large sums of money which were never received by him, and of which at such time or times he

had no knowledge, but does not state what the sums were, nor under what dates they were charged, nor how defendant could have been ignorant at the time of the settlement as to the money charged to have been paid to himself. Such being the character of the proposed amendment, we do not think it can be said that the court abused its discretion in refusing to allow it to be filed.

The defendant next offered "to introduce evidence to prove that plaintiff in the month of July or August, 1883, as the agent of the defendant, sold and delivered to one J. H. Sherez twelve head of mules, the property of the defendant, at the price of one hundred dollars per head; that the said sale was never accounted for or included in the settlements made by plaintiff and defendant, and that said plaintiff represented to defendant that no such sale was made." The plaintiff objected to the offered evidence upon the ground that it appeared from the defendant's testimony that there had been three settlements between the parties since the date of the alleged transaction, and that, under the pleadings, the evidence was inadmissible to impeach and open up the settlements so made. The court sustained the objection, and the plaintiff excepted to this ruling. We think the ruling proper. The evidence was manifestly offered for the purpose of impeaching and reopening a settled and stated account on the ground of fraud. But this, as we have seen, could not be done under the answer as it was framed and stood when the offer was made. In our opinion the judgment and order appealed from should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

HOLBROOKE v. HARRINGTON.

No. 18,198; March 28, 1894.

36 Pac. 365.

Mining Claims—Tenants in Common—Contribution.—One tenant in common of a mining claim is bound to contribute his proportion of the value of the yearly work required to be done thereon to perfect title, and performed by his cotenant, unless he abandons his interest in the unpatented claim, or offers to perform the work.

Mining Claim.—Where, in Partition by One Tenant in Common of a mining claim, on an accounting for money spent upon the land in excess of her share, no personal judgment is rendered against the other tenant, but the property is ordered to be sold, plaintiff should be allowed the full amount of the sums properly paid out, instead of only one-half, before the residue is divided.

Mining Claim—Partition.—Where, in Such an Action, the amount allowed is less than plaintiff is entitled to, being for one-half the amount paid out, error in allowing improper credits is harmless.

APPEAL from Superior Court, Nevada County; John Caldwell, Judge.

Action by Ellen E. Holbrooke against Caleb Harrington. From a judgment for plaintiff, defendant appeals. Affirmed.

J. M. Walling for appellant; P. F. Simonds for respondent.

VANCLIEF, C.—Action for partition of a tract of placer mineral land containing about twenty-five and one-half acres, situate in Nevada county, in which the plaintiff and defendant are tenants in common, in equal portions, and for an accounting as to expenditures by plaintiff upon and for the benefit of the land, in excess of her share. It appears that prior to the year 1883 the land was owned and mined in equal shares by defendant and the husband of plaintiff, Daniel P. Holbrooke; that upon the death of Daniel P. Holbrooke, in 1883, his share and interest in the land descended to plaintiff, as his only heir, and was afterward distributed to her by the probate court. And there is no question that she and defendant have been tenants in common, as aforesaid, since the death of her husband, though the defendant denied that they were ever part-

ners in the working or mining of the land; nor does it appear that defendant opposed a partition. The only questions presented here relate to the accounting. The court found that it was impracticable to partition the land by metes and bounds, and therefore ordered a sale thereof. The court found that plaintiff had expended "in acquiring the title to said premises, and in necessary expenditures for taxes and annual labor and improvement on said claim since March 1, 1883, the sum of \$1,005.75, and defendant no sum whatever, and that defendant refuses to repay to plaintiff any portion of said sum of \$1,005.75 so expended by her, or to account to her for any portion thereof." In the order of sale the court directed the proceeds of the sale to be applied as follows: "(1) To the payment of the costs and expenses of said sale and of this action, including attorney's fees allowed. (2) That there next be paid to said plaintiff, out of the proceeds of said sale, the sum of \$502.85, being one-half of said sum of \$1,005.75 paid by said plaintiff as aforesaid, in acquiring the title to said premises, and in necessary expenditures for taxes and annual labor and improvements on said claims. (3) That the rest and residue of the proceeds of said sale be divided equally between plaintiff and defendant." The defendant appeals from the judgment and from an order denying his motion for a new trial.

There seems to be no merit in the appeal, though appellant claims a reversal of the judgment on two grounds:

1. It is contended that "the judgment is against law," because, it is said, the sum of \$502.85 allowed to plaintiff from the proceeds of the sale improperly includes \$200 for annual labor done by plaintiff on the unpatented portion (ten acres) of the land for the years 1890 and 1891. The evidence, without conflict, shows that plaintiff did the annual labor required by the laws of the United States—\$100 a year—for each of the nine years immediately preceding the commencement of this action, amounting to \$900, and is amply sufficient to prove that she did such work, during the first seven of said nine years, under an express agreement with defendant that he would pay her for one-half of the work. In 1890 plaintiff, for the purpose of working and mining the claims for a profit, in addition to the annual labor required by law, erected thereon hoisting works and machinery of the value of \$3,500.

and sunk or repaired a shaft. At or about the time this work was commenced, the defendant caused a written notice to be posted on the mine, stating that he was the owner of an undivided one-half of the mine, and that he would not be "responsible for the payment of any sum or sums due, or hereafter to become due, for any labor done upon or materials furnished, to be or actually used upon said mine, by any person whatever; that E. E. Holbrooke, who is now working said mine, is not authorized to incur any obligation for or on my behalf, nor in any way to encumber or cause to be encumbered, or taken as security, my interest in said mine, or any part thereof, for any labor done for her, or at her instance, or for any materials of any kind or supplies furnished at her instance, and used on said mine." It is claimed that this notice absolved the defendant from all obligation to contribute to the annual labor required by law to be done on the unpatented ten acres for the years 1890 and 1891, but I think this is a mistake. The defendant was bound to contribute one-half of the value of that work, unless he preferred and offered to do his portion of the work, or abandon his interest in the unpatented portion of the claims, neither of which he did, as appears by the notice, and his answer to the complaint. Besides, under the circumstances, the obvious object of the notice was merely to prevent his liability for the proposed work or improvements by plaintiff in excess of the annual labor required by law; and it seems the plaintiff so understood the notice, for she has charged him nothing for the improvements made for the purpose of working the mine, and by the decree she is allowed to remove the hoisting works, valued at \$3,500.

2. It is claimed that \$106.50, for money expended by plaintiff in proceedings to obtain a patent for the unpatented ten acres, is improperly included in the \$502.85 allowed to plaintiff by the decree. These expenses were incurred and paid by plaintiff under an agreement between her and an agent of the defendant (defendant being out of this state), authorized in writing "to look after and defend my [defendant's] interest" in the whole of said mining claim, and having "full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I [defendant] might or could do if personally present." It is contended

that this instrument did not authorize the agent to make the agreement for defendant to join plaintiff in the application for a patent, and to pay half the expenses thereof. But it is unnecessary to decide this question, since the \$502.85 allowed to plaintiff from the proceeds of the sale is \$195.40 less than she was entitled to, according to the findings of fact, which are not excepted to; that is, after deducting the \$200 for annual labor in 1890 and 1891, and the \$106.50 for expenses of proceedings for patent from the sum of \$1,005.75, which she is found to have expended altogether, there remains \$698.25, which should have been paid her from the proceeds of the sale before a division of the residue. As there was no personal judgment against the defendant, the plaintiff should have been allowed from the proceeds of the sale all she had properly and necessarily expended for the preservation of the claims, before any division of the residue. But, instead of this, the court, after having found that she had properly expended \$1,005.75, ordered that she be paid only \$502.85, "being one-half of said sum of \$1,005.75 paid by said plaintiff as aforesaid." By this mistake in the judgment the plaintiff is allowed nothing for what she is found to have expended on defendant's account. It is not denied that she did the annual labor required by law for each of the seven years prior to 1890, and all the taxes. For this she was entitled to retain from the proceeds of the sale over \$700. It is very plain that there is no error in the judgment, to the prejudice of defendant, and therefore, that the order and judgment should be affirmed.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

FISKE v. CASEY.

No. 15,354; March 28, 1894.

36 Pac. 668.

Appeal—Finding Outside of the Issues.—Findings of fact on issues not made in the pleadings cannot be considered for the purpose of supporting the judgment.

Appeal—Specification of Error.—On Appeal It is not Necessary to specify that the evidence is insufficient to support a finding not embraced in the issues.

Mortgage.—In an Action to Declare a Deed Absolute on its face a mortgage, and to foreclose same, a finding by the court that, prior to its maturity, plaintiff had claimed such mortgage to be an absolute conveyance, and refused performance of the obligation, and that such refusal stopped the running of interest after maturity, is error, when no such issue is presented.

APPEAL from Superior Court, City and County of San Francisco; Walter H. Levy, Judge.

Action by Asa Fiske against E. J. Casey, administrator of Henry Shoulters, to foreclose a mortgage. From a judgment for \$163.91, and for the foreclosure of the mortgage, and an order denying a new trial, plaintiff appeals. Reversed.

Daniel Titus for appellant; Benjamin Healey and T. Z. Blakeman for respondent.

HARRISON, J.—September 14, 1881, Henry Shoulters made a promissory note to the appellant for the sum of \$150, with interest payable at the rate of three per cent per month in advance, and compounding monthly until paid. At the same time, he executed to the appellant, as security for its payment, a conveyance, absolute in form, of certain real property in San Francisco. Shoulters died at San Francisco in 1883, and in February, 1892, the respondent, Casey, was appointed administrator of his estate. March 23, 1892, the appellant presented his claim against the estate, upon the aforesaid note and conveyance, to the respondent, for allowance, and, it having been rejected by him, brought this action for the purpose

of having said deed adjudged to be a mortgage upon the land described therein, and for the sale of said land to satisfy the amount of the said note. The defendant admits these allegations of the complaint, and sets up as a defense that in March, 1892, prior to the presentation of the claim to him, he had applied to the plaintiff to ascertain the amount due upon the note, for the purpose of paying the same, and having the property discharged from the lien of the mortgage, and that upon such application the plaintiff declared to him that the instrument of conveyance was not a mortgage, but was a deed absolute, and that he was the owner of the property, and that the plaintiff then refused to entertain any offer from the defendant to pay off and discharge the mortgage. The cause was tried by the court, and judgment rendered in favor of the plaintiff for the sum of \$163.91, the amount of the promissory note, with interest up to the date of its maturity, and for the foreclosure and sale of the land described in the instrument. Plaintiff moved for a new trial, which was denied, and from that order, as well as from the judgment, he has appealed.

The court finds "that, prior to the maturity of the obligation created by the note and mortgage described in the complaint, the plaintiff claimed that said mortgage was a deed absolute, and that he was thereby the owner of the property therein described, and refused to accept performance of said obligation before any offer of performance was made, and did not, after such refusal, and before performance was due, give any notice of his willingness to accept performance." This finding is outside of any issue in the case, and cannot be considered for the purpose of supporting the judgment. The judgment itself depends upon this finding, as the theory upon which it was given is that the refusal therein found stopped the running of interest upon the note. It is unnecessary to determine whether this theory is correct, or whether the evidence in support of the averment of refusal in the answer would sustain such a finding, as the court has not made any finding upon this averment, and the finding which it has made is outside of any issues in the case. There is no averment in the complaint or answer that the plaintiff made any claim of ownership in the property, or refused to accept performance of the obligation in the note prior to its maturity, or prior to

the date at which the defendant alleges that he sought to effect a release of the lands from the mortgage; and, even if it be assumed that the evidence before the court would sustain this averment in the answer, it would not authorize a finding that such claim or refusal had been made at any previous date. A claim by the plaintiff in March, 1892, that the deed was absolute, or a refusal by him at that time to accept payment upon the note, would not impair his right to recover the amount of the promissory note according to its terms up to that date.

Annexed to the note, and apparently upon the same piece of paper, was the following: "Please send, at my risk and request, by mail or otherwise, written or printed notice of when the annexed note falls due to me, Henry Shoulters." And the court finds that no notice was ever given by the plaintiff to Shoulters of the time when the note would fall due. It is urged by the respondent that the effect of these words is that the note did not mature until such notice was given, or at least did not mature until the presentation of the claim to the administrator. If this theory be correct, it would follow that the "maturity of the obligation" referred to in the above-quoted finding did not exist until such demand in 1892, and that the court erred in not allowing interest upon the note up to that date. We think, however, that this request annexed to the note did not have the effect to postpone the maturity of the note until the holder should elect to give such notice.

The objection by the respondent that the plaintiff has not sufficiently specified the particulars in which the evidence is insufficient to support the decision in unavailing. It is never necessary to specify that the evidence is insufficient to sustain a finding which is not embraced within the issues, as the finding itself is unauthorized, even though it be supported by evidence. We do not mean, however, to say that the specification in the present case is insufficient. It directed the attention of the defendant to the particular finding which it claimed was unsustained by the evidence. The judgment and order are reversed.

We concur: Paterson, J.; Garoutte, J.

CASTLE v. SMITH.

No. 18,156; March 28, 1894.

36 Pac. 859.

Nuisance—Liability of Grantee—Notice.—In an Action against the grantee of land for the continuance of a nuisance erected by his grantor, notice to defendant that the erection was a nuisance is essential to plaintiff's cause of action, and it is not for defendant to show want of such notice. Such notice is not dispensed with by Civil Code, section 3483, making a grantee liable "in the same manner as the one who first created the nuisance," as the liability of the creator is based on the presumption that he has notice that it is a nuisance, which presumption does not arise against the grantee.

Nuisance—Liability of Grantee—Notice.—There is No Presumption that a grantee knows that a dam erected by his grantor on the land was erected without the consent of others affected thereby.

Nuisance.—In an Action for Damages Caused by the erection of a nuisance, and to compel defendant to abate the same, plaintiff may waive the equitable relief, and thereby render a finding of facts by the court unnecessary.

Judgment.—Where the Complaint Contains Two Counts, one of which does not constitute a cause of action, and the error in rendering a judgment thereon can be cured by a modification of the judgment, the verdicts on each count having been returned separately, a new trial will not be ordered.

APPEAL from Superior Court, San Joaquin County; Ansel Smith, Judge.

Action by C. C. Castle against Jennie Smith. From a judgment for plaintiff, defendant appeals. Judgment modified.

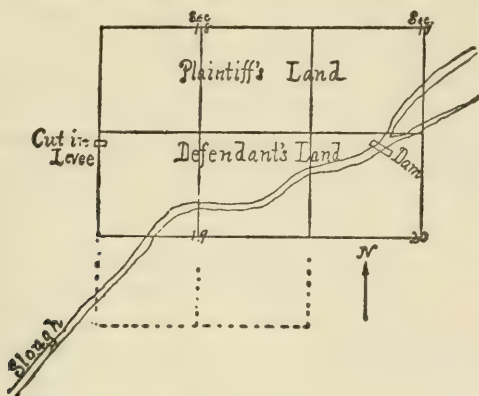
W. L. Dudley, James H. and John E. Budd, and J. C. Campbell for appellant; Swinnerton & Rutherford for respondent.

PER CURIAM.—Action to recover damages for diverting water from defendant's land, and causing it to overflow

plaintiff's land, by reason of maintaining a dam on defendant's land across a slough, and also for opening a levee on defendant's land, and thereby causing an overflow of plaintiff's land. In addition to damages, plaintiff prays for a decree that defendant abate the alleged causes of the overflow, as nuisances, by removing her dam, and closing in her levee. Richard Smith, son of defendant, was made a defendant, but, as to him, a nonsuit was ordered at the close of plaintiff's evidence in chief. The case was tried by a jury, and the jury returned a general verdict for the plaintiff on each of the two counts of the complaint; assessing the damages on the first count (for maintaining the dam) at \$4,500, and on the second count (for opening the levee) at \$3,500. After the verdict, and before the judgment, the plaintiff withdrew his prayer for the abatement of the alleged nuisances, and waived all equitable relief; and thereupon judgment was rendered on the verdict for \$8,000 and costs, taxed at \$482.80. The defendant appeals from the judgment and from the order denying her motion for a new trial.

It is admitted that since 1880 the plaintiff has owned the south half of section 18, and southwest quarter of section 17, township 2 north, range 6 east, and that from 1880 until August 3, 1889, George F. Smith (defendant's husband and grantor) owned the north half of section 19, and northwest quarter of section 20, of the same township, and adjoining plaintiff's land on the south side thereto, all situate in the county of San Joaquin. It appears that all the lands above described are swamp and overflowed lands, not generally susceptible of cultivation without reclamation; that they are, to some extent, overflowed by the tides, and are also subject to periodical overflows, to the depth of three to five feet, from the San Joaquin river and other sources, by extraordinary floods. It does not appear, however, that any part of these lands have been purchased from this state. A slough called "Twelve-mile slough" crosses the lands of plaintiff and de-

fendant, diagonally, from northeast to southwest, as shown on the following diagram:



Twelve-mile slough has no natural source of water supply, except surface drainage, during the rainy season, and has in it no water, except standing pools, during the dry season. That part of it which crosses the corner of plaintiff's land and the northwest quarter of section 20 has well-defined banks, which, at the dam, are ten to eleven feet high; but below the middle of the northeast quarter of section 19 the slough is a mere swale, having no well-defined banks, and being only about a foot to a foot and a half lower than the general level of the land bordering upon it. The east line of plaintiff's and defendant's lands is marked "Line of Segregation" upon an unofficial map used on the trial, and is understood to be the line of segregation between the swamp lands and high lands. In 1882 the plaintiff and the defendant's grantor, George F. Smith, verbally agreed to reclaim their lands in the manner following: Each, at his own expense, was to build a levee from a point at the extreme junction of their lands around his land to the segregation line; that is, the plaintiff was to build on the north and west of his land, and Smith on the south and west of his, and join their levees at said point on the west, where they were, jointly, to build a floodgate. This agreement was executed by the completion and junction of their levees in the fall of 1883. During 1884 they discovered that their levees, alone, were insufficient to protect their lands. Having been constructed mostly of peat turf, they were porous, so that large quantities of water seeped through and under them,

which, together with the water from the slough and surface drainage, overflowed their lands. Thereupon, each erected pumping-works—the plaintiff on his north line, and Smith on his west line. By means of these pumps they were generally able to keep the water down; but, in consequence of a disagreement as to the proportion of pumping each should do, plaintiff, in 1886, built a levee about three feet in height on or near his southern line, for the purpose of preventing the water from passing from the land of one to that of the other, thus relieving himself from pumping any part of the water coming in through the slough. Thereupon, Smith proposed to plaintiff that they jointly excavate a canal on the line dividing their lands, and build a levee on each side thereof, and, by means of a dam across the slough, turn the water of the slough through such canal. To this proposal plaintiff declined to assent. Smith then said he would excavate the canal on his own land, and construct a dam across the slough, turning the water of the slough into the canal, and build a levee on his side of the canal. Plaintiff objected to this, unless Smith would also build a sufficient levee on plaintiff's side of the canal. Smith declined this condition, and against the protest of plaintiff, proceeded to excavate the canal, and to build the dam and levee on his own land, and completed them on the twenty-fifth day of December, 1886. The levee thus constructed by Smith on the south side of the canal was of equal height with his outside levees, and about two and one-half feet higher than plaintiff's levee on the north side of the canal. During the next three years—that is, until December 25, 1889—the canal carried off the water from the slough without any overflow of, or injury to, plaintiff's land; and the evidence does not tend to show that plaintiff made any objection or complaint to Smith, or any other person, on account of the dam or canal, during that period of three years. On August 3, 1889, Smith executed a deed to his wife—the defendant, Jennie Smith—conveying to her all his land above described, and thereafter, on January 9, 1890, died.

1. The appellant contends that the judgment on the first count of the complaint is erroneous, for the reason that there was neither averment nor evidence that the defendant had any notice before the commencement of the action that the dam across the slough was a nuisance, nor that it ever had any

injurious effect upon the plaintiff or his property, nor that she was requested to remove it. We think this point must be sustained. It is only alleged in the first count that defendant "kept and maintained the dam across the slough since August 3, 1889, and thereby turned the water of the slough on plaintiff's land, to his damage," etc. Neither the canal nor levee is complained of. It is not averred that defendant ever had notice that the dam was a nuisance, or had any injurious effect upon plaintiff or his property, nor that she was ever requested to remove it; and while the evidence on the part of the plaintiff clearly showed that the dam was erected in 1886 by George F. Smith, as above stated, it had no tendency to prove notice to defendant of the alleged nuisance, nor a demand upon her to abate it. And the defendant testified positively that she had no such notice, and that no such demand was made upon her, before the commencement of this action. In answer to this point, counsel for respondent claim that such notice and demand were not essential to plaintiff's cause of action, and that the want of them is mere matter of defense, which should have been pleaded as such by the defendant; but we think this position cannot be maintained. In *Grigsby v. Water Co.*, 40 Cal. 407, it was said: "The rule seems to be well established that a party who is not the original creator of a nuisance is entitled to notice that it is a nuisance, and a request must be made that it may be abated, before an action will lie for that purpose, unless it appear that he had knowledge of the hurtful character of the erection." In *Plumer v. Harper*, 3 N. H. 88, it was said: "It is agreed in all the books that the grantee is not liable, until, upon request, he refused to remove the nuisance." This case is reported in 14 Am. Dec. 333, with notes by Mr. Freeman, in which he says: "The overwhelming weight of authority, therefore, is in favor of the position that no action will lie against him [the grantee] for merely continuing the erection which constitutes the nuisance in its original state, unless he has notice to abate it, and such notice is alleged. And this is so, notwithstanding the fact that he may have made repairs upon the erection constituting the nuisance, so long as such repairs do not render it more noxious than it was when it came to his possession": See the numerous cases cited to these points. Also *Conhocton Stone Road v. Buffalo etc. R. Co.*, 51 N. Y. 573, 10 Am. Rep.

646, and *Dodge v. Stacy*, 39 Vt. 560. The case of *Pierce v. Society*, 72 Cal. 180, 1 Am. St. Rep. 45, 13 Pac. 478, is not in point for respondent, since, in that case, it appears that the defendant had "full notice" of the nuisance which was caused by the manner in which a steam-bathing establishment, out of repair, was used. Section 3483 of the Civil Code provides: "Every successive owner of property who neglects to abate a continuing nuisance upon or in the use of such property created by a former owner, is liable therefor in the same manner as the one who first created it." It is claimed that this section dispenses with notice of the nuisance to the successive owner. But it is to be observed that the owner who creates the nuisance is presumed to have notice that it is a nuisance; therefore, is held liable without notice; whereas, no such presumption is indulged against his successor. Consequently, notice to the successor must be proved, else he would be held liable in a different manner from the owner who created the nuisance, as well as for a different cause. It is further claimed that the character of the dam was such that knowledge of its existence, which it is admitted defendant had, was notice to her that it injuriously affected plaintiff's land. Yet it clearly appears from the testimony of the plaintiff, as well as the testimony of other witnesses, that his land was not injured by the dam or canal until December 25, 1889, three years after their construction. And as to the injuries to plaintiff's land and crops alleged to have been suffered between December 25, 1889, and April, 1890, it is clear from the evidence that they were proximately caused by the extraordinary floods during that period, and would have been just as great if the dam and levee had not existed. All the lands similar to plaintiff's land in that vicinity, including defendant's land, were overflowed by the same floods. If there had been no dam, and no cross-levee, all the water from the slough would have flowed upon the lands inclosed by the outside levees, and would have spread all over them, as it did in 1884 before they were built (the land of the plaintiff being as low as that of defendant), and could not have escaped through the floodgates, for the reason that the water outside the levees was nearly up to the top of those levees. The outside pressure on those turf levees caused a great amount of seepage, which, together with the accumulation of surface drainage, would

have overflowed all the land inclosed by the outside levees, without any contribution from the slough, and actually did overflow defendant's land, notwithstanding its protection from the slough. In regard to this the plaintiff testified as follows: "I first saw the waters of Twelve-mile slough running in this canal, and over onto my land, in December (about Christmas), 1889. It did not come in the 1st of December, 1889. There was a great fall of snow and rain in the fall and winter of 1889 and 1890. The whole section of the country around there was all flooded. Smith's land was all covered over with water. A portion of it came from back water, seepage water, and a portion of it from the sloughs and head. The water that came down the slough covered my land. The back water came up to the top of the levee in two places, and washed over, and we put in sacks and stopped it. It was near my engine-house, on the north side of the levee. The water did not run over the top anywhere else on my levee. It continued running over there for about an hour. Then it rained again, and the water came down. The head water and back water met. It would rise again. And it was that way from that time on, probably, for a month or more after that. From December, when the waters first commenced rising, away along through January, February, and March, the whole country thereabouts was submerged by water; my land, and Smith's land, and everybody else's thereabout. There was also water came down Twelve-mile slough, got in on Smith's land and mine, and there was no place for it to get off." Under the admitted circumstances, the testimony of the plaintiff corroborates, rather than disputes, the positive testimony of defendant that she had no notice that the dam was a nuisance, or injurious to plaintiff, until the commencement of this action. All the low lands in the valley were inundated by a sudden, extraordinary flood, not caused by the dam or slough in question. Why should defendant have attributed the overflow of plaintiff's land to any other cause? Then, again, no reason appears why she should have known, or even suspected, that the dam was not built with the approbation and consent of plaintiff, and there is no presumption that she did. So much of the evidence on this point is presented for the purpose of showing that the case, on the first count, does not necessarily turn on the question of pleadings. Yet it is evident that the

case was tried by plaintiff on the theory that notice to defendant of the nuisance was not essential to his cause of action; for, in his evidence in chief, there was nothing tending to prove that defendant had any knowledge whatever of the injury complained of in the first count, or of its cause, and here he relies principally upon the same theory.

2. The second count charges that in February, 1891, the defendant cut a wide and deep aperture through the western outside levee on her own land, at the west end of the canal by reason whereof, in the following month, the back waters from the San Joaquin river and tributaries flowed through the lands of plaintiff, and destroyed his crops thereon, etc. The evidence is sufficient to justify the verdict of the jury on this count, unless, as contended by the appellant, the defendant had a right to open the levee as she did. The arguments of counsel for appellant in support of this alleged right of the defendant to open the levee are principally, if not entirely, founded upon the assumption that the lands of the parties are legally "swamp and overflowed lands," authoritatively segregated, and certified to the state, and that the parties have acquired title from the state by purchase, and thereby have incurred such obligations to reclaim the land as are imposed by law on purchasers of swamp and overflowed land from the state. But there is nothing in the pleadings or in the evidence tending to show that these lands were ever lawfully segregated as swamp and overflowed lands, or that either party claims title or possession under the state. Therefore, neither the obligations assumed by purchasers of swamp and overflowed lands nor any deductions therefrom are relevant to this case.

3. The court did not err in refusing to find the facts after the plaintiff had waived all equitable relief. Section 731 of the Code of Civil Procedure provides that a nuisance is the subject of an action, in which "the nuisance may be enjoined or abated, as well as damages recovered." Under a similar provision of the practice act (section 249), it was said by Mr. Justice Sanderson, for the court: "The nuisance is the cause of action. The abatement and damages therefor are merely the different kinds of relief to which the plaintiff may be entitled": *Yolo Co. v. Sacramento City*, 36 Cal. 196. We perceive no reason why the plaintiff was not at liberty to withdraw his prayer for abatement of the nuisance, and thereby

waive the equitable relief prayed for, nor why, after such withdrawal and waiver, findings were necessary. The verdict of the jury, if justified by the evidence, supported the judgment for damages, at least. If no equitable relief had been prayed for, the action would have been purely legal, and such as the common law denominates an "action on the case." Therefore, after the withdrawal of the prayer for equitable relief, only an action at law remained. It does not appear why plaintiff's counsel waived equitable relief. They may have done so because, in their opinion, the complaint did not entitle plaintiff to such relief, or that such relief was not justified by the evidence. However, this may be, it seems clear that the defendant could not have been injured by the refusal of the court to find facts additional to the verdict.

4. Appellant contends that the court erred, in numerous instances, in its instructions to the jury, and in rejecting evidence offered by defendant. But, so far as relates to the second count, we find no error prejudicial to the defendant. As the first count states no cause of action, and the error of rendering a judgment thereon may be corrected by a modification of the judgment, a new trial should not be ordered. The judgment is therefore modified by reducing it to the sum of \$3,982.80, which includes the costs of trial, and as so modified the judgment is affirmed; costs of appeal to be taxed to the respondent. The order denying defendant's motion for a new trial is affirmed.

HOPPE et al. v. HOPPE et al.*

FOUNTAIN v. HOPPE (HOPPE et al., Interveners).

No. 18,225; March 29, 1894.

36 Pac. 389.

Mortgage—Foreclosure—Receivership.—Where a Complaint to foreclose a mortgage prays a receiver to take and hold the premises, and collect and apply the rents and profits, third persons may intervene to assert an adverse title to the possession, and an interest in the rents.

*For subsequent opinion in bank, see 104 Cal. 94, 37 Pac. 894.

Probate Homestead—Setting Apart—Notice to Children.—Code of Civil Procedure, section 1465, requires the court, if no homestead has been declared in decedent's life, to set one apart out of the common property for the use of the surviving spouse and the minor children. Section 1468 provides that such homestead is the property of the survivor, if there be no minor children; otherwise, it belongs half to such survivor, and half to such children. Held, that 'an order setting apart such homestead, made without notice to the minor children, cannot vest title in the widow alone, so divesting the children's interest both in the homestead use and in the inheritable fee.

Probate Homestead.—Though the Proceeding is in Rem, the Widow, as administratrix, cannot represent the children, further than to withdraw the premises from administration.

Probate Homestead.—The Judgment Setting Apart a Homestead to the widow, though it recite the names of the children, does not necessarily imply that these, or any of them, are minors, nor adjudicate their interests in the premises.

Probate Homestead.—If the Effect of the Order were to Vest the fee in the widow, still she would be estopped to deny her trusteeship as to the minors' half interest.

Probate Homestead—Partition.—A Homestead Set Apart by the probate court under Code of Civil Procedure, section 1465, for the benefit of the widow and minor children, will not be partitioned until the youngest child comes of age, unless the interests of the minors clearly demand it. That the minor joins in the petition, and is represented by a guardian ad litem, makes no difference, as the court will interpose sua sponte.

Probate Homestead.—A Widow's Mortgage of a Homestead Set apart to her by the probate court for the use of the family is not void, as such homestead involves a joint use merely. Such mortgage attaches to the widow's interest, subject to the homestead use; and there being minor children entitled, with her, to such use, as well as to an undivided half of the fee, foreclosure is postponed till partition may be had, viz., when the youngest comes of age, and meantime the homestead use includes both possession and the rents and profits.

APPEAL from Superior Court, Sacramento County; A. P. Catlin, Judge.

Suit by Herman W. Hoppe and others against Julia Hoppe and W. A. Fountain for partition, consolidated with suit by W. A. Fountain against Julia Hoppe (Herman W. Hoppe and others intervening), to foreclose a mortgage. Partition suit

dismissed, and foreclosure decreed. Julia Hoppe and Herman W. Hoppe and others, separately, appeal. The dismissal was affirmed, and the judgment of foreclosure reversed.

Armstrong & Platnauer and Henry C. Ross, Jr., for appellants; Clinton L. White for respondent.

HAYNES, C.—The first of these actions (Herman W. Hoppe et al. v. Julia Hoppe and W. A. Fountain) was to obtain a partition of the lands described in the complaint, between the plaintiffs and Julia Hoppe; Fountain being made a party defendant because he claimed to be a mortgagee of the whole of the premises under a mortgage executed by the defendant Julia Hoppe. The second of these actions was afterward brought by Fountain against Julia Hoppe to foreclose said mortgage, and the plaintiffs in the first action intervened in the second, and by order of the court these actions were consolidated. Fountain demurred to the complaint in partition, and also to the complaint in intervention and to the answer of Julia Hoppe in the foreclosure case; and these demurrers were each sustained, and judgment dismissing the action for partition, and the complaint in intervention, and foreclosing the mortgage, was entered. The interveners and Julia Hoppe separately appeal from the judgment upon the judgment-roll, and a bill of exceptions setting out the order consolidating the actions, and excepting to the rulings upon demurrer. The facts set out in the several pleadings demurred to are substantially the same, and show the following facts: F. W. Hoppe died August 10, 1881, leaving the appellant Julia, his widow, and nine children, of whom these interveners were minors, the others being of full age. At the time of his death he was possessed of a tract of land, upon which he and his family resided, containing about one hundred and sixty acres, situated in Sacramento county, the same being community property. The widow was appointed administratrix, and on October 1, 1881, filed an inventory and appraisal of the estate, wherein said land was appraised at \$4,000. She also filed a petition praying for an order setting aside said land, with the dwelling-house thereon, “for the use of the family of deceased,” and alleged that the family consisted of herself and nine children, all of whom were named

therein, but their ages were not given, nor was it alleged that any of them were minors. Upon this petition, on the seventh day of October, 1881, the court made an order, of which the following is a copy:

“In the Matter of the Estate of F. W. Hoppe, Deceased.

“Julia Hoppe, the administratrix of the estate of F. W. Hoppe, deceased, having on the 21st day of September, 1881, made application to the court, by petition, for an order setting apart, for the use and benefit of the family of said deceased, the real estate mentioned in said petition, together with the improvements thereon, as a homestead, and it duly appearing to the satisfaction of the court, from the papers on file in the matter of said estate, and other evidence, that said deceased was a resident of Sacramento county at his death, and left estate therein; that letters of administration were duly issued to said Julia Hoppe on the 5th day of September, 1881, and said administratrix duly returned an inventory and appraisement of said estate; that the family of said deceased consist of said Julia Hoppe, his widow, and Emma, Frank, Edward, Othelie, Clara, Robert, Herman, Louis, and Lena Hoppe, his children; and that said applicant, Julia Hoppe, is entitled to have the said premises set apart to her for a homestead, and that the same does not exceed in value five thousand dollars,—it is hereby ordered, adjudged, and decreed that all that certain piece or quantity of land lying and being in the county of Sacramento and state of California, and particularly described as follows, to wit, the east $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of section 34, township 8 north, range 5 east, and the west $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of section 34, township 8 north, range 5 east, Mt. Diablo base and meridian, containing about 160 acres, together with the dwelling house thereon, and its appurtenances, be, and the same is hereby, set apart to the widow of said F. W. Hoppe, deceased, as a homestead, and shall not be subject to administration, and it is further ordered that a certified copy of this decree be duly recorded in the office of the county recorder of Sacramento county. Done in open court this 7th day of October, 1881.

“ROBT. C. CLARK,

“Judge of the Superior Court.”

The complaint in intervention further alleged that in the application for letters of administration the names of the

interveners were stated, together with their respective ages; that no homestead had been selected, declared, or recorded by F. W. Hoppe and his wife, or either of them, prior to his death; that at the time said homestead was set apart they were minors, the eldest being then fourteen years old and the youngest five; that the court did not fix a day for the hearing of said petition; that no notice was given, in any manner, of the hearing; that they had no notice of the hearing; that they had no guardian, general or special; and that they were not represented at the hearing by attorney appointed by the court, or by any person. On December 20, 1888, Julia Hoppe executed a mortgage upon the whole of the homestead to respondent, Fountain, to secure the sum of \$5,000, and it was this mortgage which was foreclosed; and, in regard to the mortgage, it was alleged that Fountain took it with full knowledge of all the facts.

Appellants contend that the order setting apart the homestead, rightly construed, was an order for their benefit, and vested title to an undivided one-half thereof in them in accordance with section 1468 of the Code of Civil Procedure; and, if that proposition cannot be sustained, that the order must be held void, as, if sustained, it would have the effect of divesting them, not only of their homestead rights under the statute, but also of their inheritance as heirs, without notice, or any opportunity of protecting their interests; while respondent contends that the order was simply erroneous; that it was appealable, and, not having been appealed from, it is a final judgment, and vested the title in the widow, and, being a proceeding in rem, no notice was required; and that, therefore, his mortgage is valid as against the interveners, as well as the widow.

1. As to the complaint in intervention, respondent insists that the demurrer was properly overruled, for the reason that the interveners assert a hostile title, and that such title cannot be litigated in an action to foreclose the mortgage. It was so held in *Ord v. Bartlett*, 83 Cal. 428, 23 Pac. 705, and *Cody v. Bean*, 93 Cal. 579, 29 Pac. 223, and in other cases cited therein. So far as the foreclosure proceeding is concerned, it can have no effect upon the title of the adverse claimant, unless he is made a party. It is only such title as the mortgagor may have that would be acquired by the purchaser at a foreclosure sale,

and the title of the adverse claimant may be afterward litigated with the purchaser, unaffected by the decree in foreclosure. But this case presents a feature distinguishing it from the cases above cited, though it is true in this case, as well as in those, that the title of the interveners would not be affected by the foreclosure. Respondent's complaint alleged that the mortgage contained a covenant that, in any proceeding to foreclose it, the court should, upon the filing of the complaint, or at any time thereafter, if requested by the plaintiffs, name some disinterested person as receiver, and authorize such receiver to at once take possession of the mortgaged premises, and collect the rents and profits thereof, and apply them to the satisfaction of the judgment, and to continue in the use and possession of the premises, and collect the rents and profits, until the premises should be redeemed, or title vested in the purchaser, and prayed that, upon the filing of the complaint, such receiver be appointed by the court. Here it is apparent there was an attack upon the right of the interveners to the possession of their interests in the homestead, and a demand that the rents and profits of the whole of the land, including their shares, should be taken and applied toward the satisfaction of the plaintiffs' mortgage. To such issue the interveners had a right to come in, and plead their title, and thus protect their possession and their interest in the rents and profits of the land, whether any part of such rents and profits accrued to the adults, personally, or pertained generally to the homestead right. The demurrer to their complaint in intervention should therefore have been overruled, unless the facts stated therein failed to show that they had an interest in the land which would be affected by the relief sought in plaintiffs' complaint. It therefore becomes necessary to consider the principal question in the case, viz., whether the order setting apart the homestead had the effect of vesting the entire title to the homestead in the widow, and barring the minor children of all right therein.

At the time of the death of F. W. Hoppe, and at the time the homestead was set apart, section 1465, Code of Civil Procedure, as amended in 1880, and section 1468, as amended in February, 1881, were in force: 3 Deering's Codes. Under section 1465, where no homestead had been declared in the lifetime of decedent, it is made the imperative duty of the court,

either of its own motion, or upon petition, to set apart a homestead out of the common property for the use of the surviving husband or wife "and the minor children"; and section 1468 provides that: "When property is set apart to the use of the family in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one." The questions arising upon the order of the court setting apart the homestead, and relieving the land from administration, must be solved in the light of the code provisions above mentioned, and the law relating to the jurisdiction of courts and the conclusiveness of judgments; the ultimate questions being: (1) In whom did the order vest the title to the homestead? And (2) if it vested the entire title in the widow, are the interveners estopped by the judgment or order from now asserting the right which the demurrer concedes they were entitled to under the statute, and which should have been secured to them by the order? As against the interveners, respondent's rights must rest upon the fact that a homestead was set apart, as otherwise the land was not released from administration, and in such case the mortgage could only affect such interest as the widow might have in the land subject to administration. Clearly, it could not affect the rights of creditors, nor the interests of the children, as heirs of their deceased father, unless the land was released from administration. To sustain his judgment as against the interveners, he must therefore go a step further, and show that the order in question not only relieved the land from administration, and took away from the minors their right to an undivided one-half of the homestead, but also the rights of all the children as heirs. That all this could be accomplished without notice to the children, and without being in any manner represented or heard, is sufficiently startling to challenge our most careful consideration. It is doubtless the general rule that no one is concluded or bound by a judgment, in the absence of notice, actual or constructive. It is said, however, that the legislature may authorize a judgment to be

rendered against a party without notice. But, "if the expression used in the statute will admit of a doubt, it will not then be presumed that a construction dispensing with notice can be agreeable to the intention of the legislature, the consequences of which are so unreasonable. But where the signification is manifest, there is no power of dispensation in the courts": *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248. See, also, *Meade v. Deputy Marshal*, 1 Brock. 324, Fed. Cas. No. 9372, where a similar statement of the law is made by Chief Justice Marshall. Assuming, as respondent contends, that the statute does not require notice of a proceeding to set apart a "probate homestead," under the principles laid down by the cases above cited, it follows that the action of the court, in the absence of notice to the minors, can go no further than the statute expressly authorizes; and, if it assumes to take away from anyone not before the court a right given by the statute, such person cannot be bound by the judgment. This also results from a principle applicable to all judgments, viz., that no one, not even a party with notice, is bound by the adjudication of a fact not necessary to be adjudicated in the proceeding: *Greenleaf on Evidence*, sec. 534. That a proceeding to set apart a probate homestead is in rem is conceded; but the question to be solved is, how far, and as to what matters, a judgment in rem is conclusive. A judgment strictly in rem is binding and conclusive on all the world, while a judgment inter partes only concludes parties and privies; and hence it is that, in setting apart a homestead, only those facts which are essential to the determination of the status of the property are conclusively adjudged. For such purpose the executor or administrator represents all persons affected by the order, but it is obvious that he cannot represent adverse interests in the homestead so set apart, so so as to bind them, nor litigate for them a controversy as to whether A is or is not a minor, his age being disputed. The probate of a will, for example, does not establish the fact that the dispositions therein were not beyond the power of the testator. The result is that it is the judgment of the probate court on the will, as distinguished from specific findings, or facts necessarily involved therein, that is binding on all persons: *Bigelow on Estoppel*, p. 222. The case of *De Mora v. Concha*, 29 Ch. Div. 268 (decided in 1885), is a most instruc-

tive case upon this subject. A native of Chile made his will in London and shortly thereafter died there. A caveat having been entered on behalf of the testator's daughter, the will was propounded by the executors, they alleging that the testator was domiciled in England. The daughter alleged that the testator was domiciled in Chile, and that his will was not executed according to Chilean law. The judge of the probate court made a decree declaring the will valid, found that the testator was domiciled in England, and decreed probate to the executors. The daughter afterward filed a bill against the executors, alleging that the testator was a domiciled Chilean, that his will, being executed in England according to English law, was good by the law of Chile, but only so far as the testator could, by the law of Chile, dispose of his property by will; that, according to that law, he could only dispose by will of one-fourth of his personal estate; and that the other three-fourths belonged to the plaintiff. The executors set up the decree of the probate court, that he was domiciled in England, as a bar. It was held that the decree of the probate court was not conclusive in rem as to the domicile, for that it did not appear that the decree was necessarily based on the finding as to domicile; and held, further, that the finding by the probate court as to domicile was not binding inter partes, as between the daughter and the legatee, for that it was a finding between the daughter and the executors; that the executors could not, by litigating a question of domicile, which it was not necessary to decide for the purposes of the suit, conclude the legatee, and as the legatee was not bound the daughter could not be bound. So far as the power of the court to declare a homestead was concerned, the existence or nonexistence of minor children was a wholly immaterial fact, not necessary to be either considered or decided, since it could not affect either the character, extent, duration or value of the homestead. Nor was it in the power of the widow, as administratrix, to represent the minor children, or anyone interested in the estate, whether heir or creditor, further than the proceeding was strictly in rem, viz., to withdraw or relieve the land from administration, and devote it to homestead purposes for those whom the statute declared to be entitled to it. The proceeding, in the absence of parties duly notified, could go no further than to give effect to the legislative provision,

leaving the parties so entitled to assert their interests in the homestead whenever a hostile claim should make it necessary.

Respondent further contends that the order in question was appealable, and, not having been appealed from, is final and conclusive. This question was considered in the recent case of *In re Moore*, 96 Cal. 530 (par. 7), 31 Pac. 584, where it was held that an order setting apart a homestead, "the undivided one-half thereof to the widow," and the undivided one-sixth to each of three children named, out of the separate property of the deceased, though erroneous, in that it should have been set apart for a limited time, only, and not in fee, no appeal having been taken therefrom, the title was in the persons named in the decree, as against the heirs of the deceased. Mr. Justice Paterson dissented upon this point, while concurring in the reversal upon other grounds, and placed his dissent squarely upon the ground that the court "could not—had no power to—set aside a homestead in fee," out of the separate property of the deceased, and that no appeal from the order was necessary. But that case is clearly distinguishable from this. There the minor children were adverse parties. The widow in that case petitioned for a homestead. The children appeared by their guardian, and filed objections to granting the prayer of the petitioner. Their objections prevailed, the petition was denied, the petitioner appealed, and the supreme court reversed the order, and remanded the case for further proceedings: See *Estate of Moore*, 57 Cal. 437. After the case was remanded the superior court made the order referred to, and that order was not appealed from. In that case the minor children were before the court, and were represented by their guardian, and had an opportunity to litigate every question relating to the homestead, and to make a record upon which this court could have reviewed any alleged error, while in this case the minor children were not in fact before the court, nor constructively present for any purpose, except in so far as the proceeding was in rem. For that purpose they were represented by the administratrix, who was the petitioner, but who certainly was not authorized to represent them in a proceeding by which she acquired, as respondent contends, their interest in the homestead. Besides, neither the petition nor the order disclosed the fact that these interveners were minors, and it is at least questionable whether an appeal upon that record

would not have been fruitless. But the rights of the minors were not adjudicated. The statute is mandatory. The judge must set apart the homestead; the word "may" in section 1465, Code of Civil Procedure, being used for "shall": *In re Ballentine*, 45 Cal. 696. "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been adjudged, or which was actually or necessarily included therein, or necessary thereto": Code Civ. Proc., sec. 1911. That there were children is recited in the order, but it does not appear that the court investigated or decided as to the age of any of them, for such investigation was not necessary to the validity of the order setting apart a homestead; and, as the minors were not parties to the proceedings for the purpose of litigating their right to an interest in the homestead, the order should not be construed as having excluded them. The order does not necessarily affirm or deny that any of the children were minors. If the homestead could not have been set apart unless there were minor children, the inference that the court found that there were minor children would be inevitable; but, as the homestead must have been set aside if there had been no minor children, there being a widow, an inference that the ages of the children were adjudicated can only be drawn by argument, and such adjudication cannot be inferred by argument or construction: *Freeman on Judgments*, sec. 258, and cases there cited. This proceeding being in rem, and without notice, all that could be properly adjudged was the status of the property, viz., that it was a homestead, and was relieved from administration; and the order should be so read and construed, if its language will permit it. In *Watson v. His Creditors*, 58 Cal. 558, speaking of a homestead declared before the death of either spouse, this court said: "The law fixes the rights of the parties, and the title by which the property shall be held; and, when the statute declares that the title shall vest absolutely in the survivor, no order of the probate court could make it the joint property of the husband and the children of the husband and wife." And in *Rich v. Tubbs*, 41 Cal. 34, in relation to the same character of homestead, it was said: "The purpose and effect of the order is merely that the property be relieved from administration. The question of title, as between claimants, is to be determined in another forum." We think that only that effect

should be given to an order setting apart a probate homestead. If it be true that the statute does not require notice, such ought to be the only effect of the order. If, however, the effect of the order was to vest the title in the widow, she is estopped to deny the right of the minors therein, and, if necessary for their protection, would be held a trustee of that title for them, to the extent of their interest; for, as they are not estopped by the judgment from asserting their interest, nothing more than the legal title could pass to her by the judgment. If the mortgage to Fountain had not been executed, I apprehend that no one would contend but that the interveners could successfully assert their right to an undivided one-half of the land. Whether an encumbrancer without notice other than that imparted by the record in the proceeding to set apart the homestead, seeing therein the names of the children, their ages not being stated, would not be obliged to presume that they were all minors, and so interested in the homestead, it is not necessary to decide, inasmuch as the demurrer admits that he took the mortgage with knowledge or notice of the fact that the interveners were all minors, and in such case he could be in no better position than his mortgagor.

2. The demurrer to the complaint for partition was properly sustained. For the purposes of this demurrer, we assume that the facts stated show that the petitioners have an interest in the homestead to the extent claimed; but we think that a homestead cannot be partitioned, at least until the youngest child attains his majority. There are many instances in which the right to partition must be denied because the property has been charged with some trust, or dedicated to some purpose which would be defeated or impaired by the division of such property. In *Outcalt v. Appleby*, 36 N. J. Eq. 81, among other reasons for refusing a partition, it was specified, that the testator did not contemplate a division of the residuary estate as then proposed; that by his will he expressed his wish that the trustees hold the improved property unsold for ten years, unless, in their judgment, it would not be advisable to do so. In *Gerard v. Buckley*, 137 Mass. 478, the intention of the testator was also held to control the right of partition: See, also, *Hill v. Jones*, 65 Ala. 214. In Missouri the statute vests in the family of the deceased husband an estate in his realty which does not cease to exist until the widow dies and the

youngest child becomes of age; and it was held that a purchaser from the mother of a minor child, who has a homestead right in the property bought, is not entitled to partition against the child; that the child is entitled to a homestead in the property, and not merely an aliquot part thereof: *Rhorer v. Brockhage*, 13 Mo. App. 397. So in *Trotter v. Trotter*, 31 Ark. 145, it was held that there can be no partition of the homestead. The question whether there may be a partition of a probate homestead has not heretofore been presented to this court. Principles, however, have been announced which I think are conclusive of the question. In *Estate of Moore*, 57 Cal. 442, 443, it was said: "A homestead right, or a right to have a homestead, is not a right which vests under the law by succession. It is a right bestowed by the beneficence of the law of this state for the benefit of the family. . . . The homestead, when set apart, is to be set apart for the benefit of the widow and children. Every minor child has an interest, and has a right to be named in the decree. The property set apart is to be a home for them all, she, the widow, taking her place as the head of the family. It certainly could not be said that her deed, conveying her interest as successor, would interfere with and defeat the purpose of the law in giving the family an abiding place." And quoting from *Bates v. Bates*, 97 Mass. 395, the court further said: "The estate of homestead is one of a peculiar nature. It is a provision by the humanity of the law for a residence for the owner and his family." It is true that section 1468, Code of Civil Procedure, provides that the homestead so set apart shall belong to the surviving husband or wife, if there be no minor child or children; but, if there be a minor child, one-half of the homestead shall belong to the surviving husband or widow, and the remaining one-half to the minor child, or in equal shares to the minor children, if there be more than one. But this provision only declares the ultimate ownership, and does not at all affect the use of the property as a family homestead. The homestead is of the same character, value and extent, whether there be one minor child or several; and the necessity for the continuance of the homestead until the youngest child has attained majority is as imperative as the creation of the homestead when there was but one. In this case one of the children is still a minor. If the homestead is partitioned, it

is destroyed as a homestead, and the interest of this minor is restricted to one-eighth of what had been the homestead. Which of the parties, in case of partition, shall have the dwelling-house which has sheltered the family? And, if allotted to another, can the minor still claim shelter therein? Has he not received his portion, and shall he now say that he has any right in the portion allotted to another? A partition is therefore a destruction of the homestead, an undoing of the imperative requirement of the statute that a homestead shall be set apart for the use of the family (*In re Ballentine*, 45 Cal. 696), and would be in violation of a wise and beneficent public policy; and surely, if the will of a testator, expressing his desire or intention that his property shall be held in common and not divided, is sufficient to prevent a partition, the obvious purposes and intent of the statute ought to be held sufficient. It may be said, however, that the minor has joined in the petition for a partition of the homestead, and is represented therein by a guardian ad litem, and that, therefore, no objection to a partition should be urged in his behalf. But the court will, sua sponte, interpose for the protection of a minor, and especially where, as here, a question of public policy is involved. We do not say that no case could arise where the court would not order a partition of a homestead. Circumstances might exist where it would be the duty of the court, for the benefit of the minor, to decree a partition, or order the interest of the minor to be sold. But this qualification need not be discussed. It is sufficient to say that no reason appears upon the face of the complaint why the homestead should be partitioned during the minority of one of the plaintiffs, and therefore it does not state facts which would authorize the partition of a homestead, which, if it can be partitioned at all during the minority of any of the beneficiaries, could only be done under special circumstances alleged in the complaint and proved at the hearing. Even in case of application by or on behalf of infants for the partition of lands held under an ordinary tenancy in common, and not affected by homestead or other special right, it is said the courts are specially charged with their protection; and, if the conclusion is reached that the partition will not prove beneficial, it ought to be denied: *Freeman on Cotenancy*, sec. 457;

Hartmann v. Hartmann, 59 Ill. 104; Freeman v. Freeman, 9 Heisk. 306.

3. The answer of Julia Hoppe in the foreclosure case set out all the facts in relation to the homestead hereinbefore stated, and alleged that the mortgage was void and a cloud upon the homestead, and prayed that it be canceled. The question is made whether the mortgage created a lien upon her interest in the land, whatever that interest may be. Unquestionably, she is the owner of an undivided half. It is contended, however, that a homestead cannot be mortgaged without the concurrence of all who are interested in the title; and cases are cited of homesteads declared upon community property in the lifetime of both spouses, in which it is held that neither can convey any interest in the homestead by a separate deed. These cases are not in point. The effect of such declaration of homestead is to create a joint tenancy with survivorship. It ceases to be community property, and therefore the husband cannot convey it by his deed. Nor does it become the wife's separate property, and she cannot convey it. And, as the statute provides the mode in which it can be conveyed, neither, separately, can convey any interest therein. But upon the death of one of the joint tenants the estate vests in the survivor, and may then be conveyed or mortgaged. A probate homestead does not create a joint tenancy, though it creates a joint use.

It is further argued that, if the widow may mortgage her interest in the homestead, the mortgagee may foreclose; that the purchaser would become tenant in common with the minors, the homestead be destroyed, and the object of the legislature defeated. So far as homestead purposes are concerned, the principal object of the statute is accomplished when the youngest child arrives at majority. The homestead may then be partitioned, and each hold his interest in severalty. We have already held, in considering another branch of this appeal, that a partition cannot be had until all the children have arrived at majority; and, if this cannot be done by action, it cannot be accomplished in an indirect manner. No stranger can be admitted to the benefits and privileges of the homestead by succession to an undivided interest. But all this does not make the mortgage void, though it may postpone the possession of the purchaser. As the widow is the head of the

family, and as the homestead must continue until the minors have all reached majority, she has the same interest in retaining the possession and controlling the rents and profits that the interveners have, and therefore, though her mortgage is not void, her answer is not obnoxious to a general demurrer.

The order sustaining the demurrer to the complaint in partition and the judgment dismissing that action should be affirmed. The judgment foreclosing the mortgage should be reversed, with directions to overrule the demurrers of respondent to the complaint of the interveners and to the answer of the defendant, with leave to respondent to answer the complaint in intervention.

We concur: Searls, C.; Belcher, C.

McFARLAND and FITZGERALD, JJ.—For the reasons given in the foregoing opinion, the judgment dismissing the action for partition is affirmed, and the judgment foreclosing the mortgage is reversed, with directions to the court below to overrule the demurrers to the complaint in intervention, and to the answer of Julia Hoppe, respectively, with leave to the plaintiff to answer the complaint of the interveners.

DE HAVEN, J.—I concur in the judgment.

ESHLEMAN v. HENRIETTA VINEYARD CO. et al. (No. 3180.) SAME v. MALTER et al. (No. 3593.) HENRIETTA VINEYARD CO. v. ESHLEMAN et al. (No. 3653.)*

No. 18,018; March 29, 1894.

36 Pac. 775.

Specific Performance—Parol Contract—Part Performance.—

In an action brought in 1890 for specific performance of an oral contract to convey land, made in 1886, the court found that plaintiff was in possession, and took crops off the land, during 1886 and 1887, with defendant's knowledge, and that during such time, and ever since, plaintiff claimed title under the contract; but it was not alleged or found that plaintiff continued in possession after 1887. She never paid anything on the contract price, though she tendered the whole of it "prior to the commencement of this action." Held,

*See 102 Cal. 199, 36 Pac. 579.

that there was no such part performance as would take the contract out of the statute of frauds.

Specific Performance—Laches.—Where a Vendee of Land Delays more than four years after she accepts a deed, before suing to compel a conveyance of land which she alleges was wrongfully reserved in the deed to the grantor, she is not entitled to relief, though she did not discover the error until within three years of the suit, in the absence of fraud or deception which prevented her from sooner discovering it.

Specific Performance—Laches.—Where It is not Found That Plaintiff did not discover the error thirty-five months before the commencement of such action, and before she tendered payment and demanded a deed, she is not entitled to specific performance, even if her negligence in not discovering the error sooner than she did was excusable.

APPEAL from Superior Court, Fresno County; M. K. Harris, Judge.

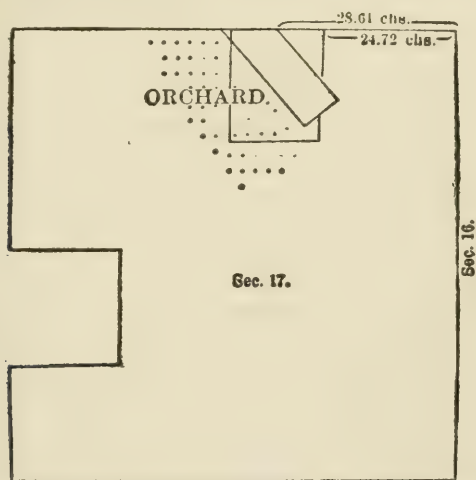
Three actions—one by M. D. Eshleman against the Henrietta Vineyard Company and G. H. Malter, one by the same plaintiff against G. H. Malter and others, and one by the Henrietta Vineyard Company against I. S. Eshleman and others. From a judgment for defendants in each of the actions, plaintiff appeals. Affirmed.

Edward Lynch for appellants; Tupper & Tupper for respondents.

VANCLIEF, C.—These three causes, together, are designated in this court by the number 18,018. In the lower court, they were numbered, respectively, 3180, 3593, and 3653, as above. All the parties to the three causes, being represented here by the same attorneys, have stipulated that the decision of this court in the first order, 3180, shall control the judgment in the other two. That is, if the judgment of the lower court is affirmed in the first, it shall be affirmed in the other two; but, if reversed or modified in the first, it shall be reversed or modified likewise in the other two. Therefore, only the appeal in the first (*Eshleman v. Henrietta Vineyard Company and Malter*) need be considered. It is an action to enforce specific performance of a contract to sell to plaintiff certain tracts of land situated in the county of Fresno, originally executed in writing. The written contract was between the defendant Malter, of the first part (vendor), and I. S.

Eshleman, of the second part (vendee). At the time the contract was executed (January 11, 1886), the title to the land which was the subject of the contract was in the defendant Henrietta Vineyard Company, a corporation, whose directors are alleged and found to have been under the control of Malter, by virtue of his ownership of all the stock, except a few shares held by the directors. I. S. Eshleman made the contract for the benefit of the plaintiff, and assigned it to plaintiff before the commencement of this action. The land to be conveyed consisted of certain described legal subdivisions of sections 16 and 17, containing about seven hundred and twenty acres, and included the northeast quarter of section 17, except a small parcel thereof, called the "Winery Tract," on which was a winery. This Winery tract was reserved from the sale by the following description in the contract. "A tract of from ten to, and not exceeding, twenty acres, on which the winery of the party of the first part now stands, bounded on the north by the north line of said section, to lie in a compact and square shape, with its northwest corner at the point on said north line, which is now the northeast corner of the orchard on the northwest quarter of the northeast quarter of said section, and with its northeast corner on said line, at a point thirty feet west of the headgates of the ditches which irrigate said lands, and with its south line not exceeding two hundred feet south of said winery." The contract price to be paid for the land was expressed to be "at the rate of \$41.66 $\frac{2}{3}$ per acre." It is alleged in the complaint, and found by the court, that on January 20, 1886, nine days after the date of the contract, Malter procured a conveyance from the Henrietta Vineyard Company to plaintiff of all the several tracts of land described in the contract; reserving, however, from the northeast quarter of section 17, fourteen and forty-six hundredths acres as the Winery tract, plainly described in the deed to plaintiff, in connection with the description of the north line of said northeast quarter of section 17, as follows: "And also that part of the northeast quarter of section seventeen (17) bounded and particularly described as follows, to wit: Beginning at the northeast corner thereof, running thence west on its north line twenty-four and 72 hundredths chains; *thence, at right angles, south, thirteen and 15 hundredths chains (13.15); thence west eleven (11) chains; thence, at right angles, north, thirteen and 15 hundredths*

chains (13.15), to said north line thereof; thence west, along said north line, to the northwest corner of said section''; and thence runs south, west, and north, around the quarter section, to the place of beginning. The italicized part of the description shows the exclusion of the fourteen and forty-six hundredths acres, as the Winery tract, "in a compact square form." The plaintiff accepted the deed with this description without objection, and paid for the land conveyed, and no more, at the contract price per acre; and defendants contend that this was full performance of the contract on their part. On the next day after the conveyance to plaintiff, the Henrietta Vineyard Company conveyed the reserved Winery tract to the defendant Malter and E. B. Rogers. It is claimed by plaintiff that the tract reserved for the winery is not in conformity with the contract as understood by the parties, either as to quantity of land or the form in which it is located; that it contains too much land, by eight acres; and that the lines bounding the east and west sides thereof, instead of running from the north line of the section directly south, at right angles therewith, should have run south, forty degrees and forty-three minutes east. Counsel for appellant has attached to his brief a little map, which he says correctly represents the difference between the tract reserved and the tract which should have been reserved, as follows:



This map will sufficiently represent the difference, as understood by counsel, without reference to the coloring.

It is alleged in the complaint, and the court found, that the Winery tract referred to in said agreement was at the date of said agreement, and still is, "a well-marked and defined body of land, of square shape, bounded on the north by the section line of section 17 and a fence; on the west by a straight row of large trees and a fence; on the east by a straight row of large trees"; and "that it was agreed and understood between the parties to said agreement and plaintiff, at its execution, that the Winery tract to be reserved by the terms of said agreement was the body of land last above described, and said tract was pointed out on the ground to said I. S. Eshleman and plaintiff, at the date of said agreement by said Malter and his agent, as the Winery tract referred to in said agreement." It should be noted, in passing, that this is not very definite as to what was pointed out. No boundary for the southeast end is mentioned. Nor is it said that any fences or rows of trees were pointed out as boundaries. It is further alleged and found that during the years 1886 and 1887 the plaintiff was in possession of the two parcels of land in question, and that she cultivated the same, with the knowledge of the defendants. These two parcels, of which a conveyance is sought to be enforced, are separated from each other by the parcel which plaintiff claims should have been reserved as shown on the above map, and together contain about eight acres. It is also found that prior to the commencement of this action (how long before is not found) the plaintiff tendered to each of said defendants, and to said E. B. Rogers, the contract price of said two parcels of land, and demanded from each a conveyance of their title thereto; that the defendants refused to convey, but that Rogers, on April 1, 1891, conveyed to plaintiff all his right, title, and interest in the whole tract of fourteen and forty-six hundredths acres reserved in the deed, his interest being an undivided half thereof, for which plaintiff paid him the contract price per acre. So that plaintiff seeks by this action to enforce a conveyance from defendants of only an undivided half of the two small, separate tracts, containing eight and six hundredths acres, in which it is found that the corporation defendant has no interest whatever, having conveyed the whole tract of fourteen and forty-six hundredths acres reserved in the deed to Malter and Rogers on January 21, 1886. The court found, as

a conclusion of law, that plaintiff was not entitled to a decree for specific performance of the agreement, and rendered judgment accordingly. The plaintiff appeals from the judgment, on the judgment-roll, and contends only that, upon the findings of fact, the judgment should have been for plaintiff, decreeing specific performance of the contract—not as written, however, but according to a contemporaneous understanding and agreement between the parties, which was not reduced to writing, and which is palpably inconsistent with the written contract, or any possible construction of it. Therefore, to the extent that the verbal differs from the written agreement, the action must be deemed an action for specific performance of a verbal agreement, and treated accordingly, and so it seems to be regarded by counsel for appellant; and, since the findings warrant no relief independent of the verbal agreement, the judgment should be affirmed, unless they are sufficient to support a decree for specific performance of a verbal agreement.

1. In the first place, a part performance of the agreement by the plaintiff was essential to the support of such a decree, but this fact is not found. It is found, however, that during the years 1886 and 1887 the plaintiff was in actual, exclusive and peaceable possession of the two tracts of land in question, and that she cultivated and took crops off the same with the knowledge of the defendants, and that during said years plaintiff claimed, and has ever since claimed, title to each of said tracts of land under the agreement. But it is not found, even by implication, that the defendants consented to such possession, nor that they had notice that plaintiff claimed title at any time before she tendered payment to Malter and Rogers, and demanded of them a deed, which tender and demand are alleged and found to have been made “prior to the commencement of this action”; but how long prior to the commencement of the action is not alleged nor found. It is found, however, that defendants had knowledge that plaintiff cultivated and took crops off the land in question; but this mere knowledge of defendants does not imply their consent, although such knowledge, without objection, would imply consent, under some circumstances. The mere knowledge of defendants that plaintiff cultivated and took crops from the land during the years 1886 and 1887 is not, under the circumstances disclosed by the findings, inconsistent with the fact that the cultivation and

taking of crops were without defendants' consent, and even against their express protest, and therefore does not imply their consent. Why is it neither alleged nor found that plaintiff continued in possession after 1887, and up to the commencement of the action—April 8, 1890? The probable reason that there is no finding as to such possession during the years 1888 and 1889 is that there was no allegation of possession during these two years; and, as against the pleader, it is fair to presume that there was no such allegation because there was no such possession. There is no pretense that plaintiff improved the land, and it appears that she never paid a dollar on the contract price, since she tendered the whole contract price "prior to the commencement of this action." All the money paid had been applied to payment for the land deeded to her on January 20, 1886, at the contract price of \$41.66⅔ per acre. Nor is there any pretense that the land in question is of greater average value per acre than the land conveyed, nor that the cultivation and cropping of the land in 1886 and 1887 were unprofitable, nor that defendants were benefited thereby. Since the plaintiff has suffered no injury, and the defendants have gained no advantage, from plaintiff's possession and cultivation of the land, it follows that such possession and cultivation did not constitute such part performance as will exempt the verbal agreement from the effect of the statute of frauds. The essential constituents of such part performance as will take a verbal contract for the sale of land out of the statute of frauds are concisely stated by Mr. Pomeroy, in his book on Contracts (section 104), as follows: "The foundation of the doctrine is fraud; not necessarily an antecedent fraud, consciously intended by the party in making the contract, but a fraud inhering in the consequence of thus setting up the statute. When a verbal contract has been made, and one party has knowingly aided or permitted the other to go on and do acts in part performance of the agreement, acts done in full reliance upon such agreement as a valid and binding contract, and which would not have been done without the agreement, and which are of such a nature as to change the relations of the parties, and to prevent a restoration to their former condition and an adequate compensation for the loss by a legal judgment for damages, then it would be a virtual fraud in the first party to interpose the statute of frauds as a

bar to the completion of the contract, and thus to secure for himself all the benefits of the acts already done in part performance, while the other party would not only lose all advantage from the bargain, but would be left without adequate remedy for its failure or compensation for what he had done in pursuance of it. To prevent the success of such a palpable fraud, equity interposes under these circumstances, and compels an entire completion of the contract, by decreeing its specific execution." To the same effect is the case of *Foster v. Maginnis*, 89 Cal. 264, 26 Pac. 828.

2. Plaintiff's delay of more than four years after having accepted the deed of January 20, 1886, as full performance of the agreement on the part of defendants, was so unreasonable, under the circumstances, as to justify the denial of the relief sought. It is true the court found that plaintiff did not discover the alleged error in the description of the land until within three years before the commencement of the action, but did not find when, within three years, plaintiff first discovered the error. But, in the absence of fraud or deception on the part of defendants, the failure of plaintiff to discover that the plain and definite description of the land in the deed which she accepted was not in accordance with the verbal agreement must have been the result of her own inexcusable negligence, from the consequence of which a court of equity will not ordinarily grant the kind of relief sought in this case: *Pomeroy on Contracts*, sec. 444. But, conceding that the negligence was excusable, it is not found that plaintiff did not discover the error two years and eleven months before the commencement of the action, and before she tendered payment and demanded a deed for the two parcels sued for; and, as the burden of excusing her delay devolved upon plaintiff, it may be presumed that she discovered the error barely within three years before she made any complaint whatever. In *Fowler v. Sutherland*, 68 Cal. 415, 9 Pac. 674, a delay of two years and three months was held to be unreasonable. In *Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725, a delay of twenty-two months was held to be a defense to an action for specific performance: See, also, *O'Donnell v. Jackson*, 69 Cal. 622, 11 Pac. 251; *Burnett v. Kullak*, 76 Cal. 535, 18 Pac. 401, and *Requa v. Snow*, 76 Cal. 591, 18 Pac. 862. I think the findings of fact support the judgment, and, under the stipula-

tion, that the judgment in each of the above-entitled causes, numbered, respectively, in the court below, 3180, 3593 and 3653, should be affirmed.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, it is ordered that the judgment in each of the above-entitled causes, numbered, respectively, in the court below, 3180, 3593 and 3653, be affirmed.

FRESNO MILLING CO. v. FRESNO CANAL & IRRIGATION CO.

No. 18,133; March 30, 1894.

36 Pac. 412.

Contract for Water-power—Construction.—A contract for the use of water as a motive power for a mill gives the mill no right to use such water for any other purpose.

Contract for Water-power—Damages for Breach.—Under a contract for the use of water as a motive power the mill owner is not damaged by a failure to deliver the amount of water called for, when an amount equal to the full capacity of plaintiff's mill wheel is delivered.

Judgment—Pleading in Bar During Time for Appeal.—A judgment cannot be pleaded in bar during the time for appeal therefrom and while a motion for a new trial is pending.

APPEAL from Superior Court, Fresno County; M. K. Harris, Judge.

Action by the Fresno Milling Company against the Fresno Canal & Irrigation Company. From a judgment for defendant and an order denying a motion for a new trial plaintiff appeals. Affirmed.

T. P. Ryan for appellant; Church & Cory and Harry I. Thornton for respondent.

GAROUTTE, J.—This appeal is taken from the judgment and order denying a motion for a new trial. Upon the rendition of the judgment the trial court filed the following opinion regarding the questions involved in the litigation. It is lucid and convincing, and we are satisfied with the views there expressed:

“The pleadings in this case are quite voluminous, but the relief sought and prayed for may be divided into three heads: First. That a certain contract of writing, entered into by M. J. Church, the Fresno Canal and Irrigation Company, and the Fresno Milling Company, dated April 22, 1886, be canceled, and that the defendant, the canal company, be enjoined from using the same or asserting any rights thereunder. Second. That the defendant, the canal company, be required to furnish a deed in fee simple to the plaintiff to eighty-three and one-third cubic feet of water passing a given point per second. Third. That the defendant be required to pay said plaintiff damages for said canal company’s failure and neglect to furnish certain water agreed to be furnished to plaintiff, or the value of the rents and profits of certain water alleged to have been used by defendant, which plaintiff alleges rightfully belong to the plaintiff, the milling company. There are other questions, but they are corollaries of the foregoing propositions, and stand or fall with them.

“On the tenth day of September, 1885, a certain contract of writing was entered into between M. J. Church, the Fresno Canal and Irrigation Company, and one Joseph G. Deming. Under this contract said Church agreed to sell said Deming lots 28, 29, 30, 31 and 32, block A, of the town of Fresno, on which were then situated what were commonly known as the ‘Champion Mills,’ together with said mills and other improvements thereon, and the water-power to the amount of eighty-three and one-third cubic feet of water per second for running said mill, with all the privileges and appurtenances thereunto belonging or appertaining, for which said Deming agreed to pay the sum of \$20,500—\$10,000 in cash, and \$10,500 thereof as soon as the canal used to convey water to said mill for motive power should be so enlarged and improved as to deliver to said mill for such motive power the amount of eighty-three and one-third cubic feet of water per second. The party of the second part, the Fresno Canal and Irrigation Company,

agreed to begin at once upon said canal to increase its capacity, as aforesaid, and to enlarge and improve the said canal so that it should deliver at the said mill, for its motive power, not less than eighty-three and one-third cubic feet of water per second; said work to be completed within ninety days. Said Church and the canal company further agreed that when said second installment of the purchase price of said property, to wit, \$10,500, should be paid, that they would make, execute, and deliver to said Deming, as the grantee, a good and sufficient deed of grant of said property, which should convey to him a perfect title in fee simple, absolute, free and clear of all encumbrances, of said lots, with said mill and improvements thereon situated, together with all the privileges and appurtenances thereunto belonging, with a water right of eighty-three and one-third cubic feet of water per second for said mill during the existence of said corporation. The canal company further agreed that upon the payment of said sum it would furnish to said Deming, during the period of its existence, for the running of said mill, an amount of water equal to eighty-three and one-third cubic feet per second, providing that it should have the privilege of shutting off the water in said ditch during such times as should be necessary for the repairing of the same etc., and should not be held responsible for lack of water caused by drought, insufficient water in King's river, hostile diversion, temporary damage by flood, etc., but that it should at all times use due diligence in restoring and maintaining the flow of water in said canal. It was also agreed that said Deming should have the right to turn in enough additional water to make up said amount into the mill canal, at any waste-way or bulkhead between the mill and the northwest corner of section 36, township 13 south, range 20 east, in case of any deficiency in said agreed supply. or that he might turn off any excess, if necessary. The canal company further agreed that it would enlarge the capacity of the ditch below the mill, so as to take away the water as fast as it should be necessary to prevent its impeding the running of the mill. This clause is also in said contract: 'It is also understood and agreed by and between the respective parties hereto that the above grant to the party of the third part [being said Deming] of the water right of eighty-three and one-third cubic feet of water per second as a motive power for

said mill is intended to vest in said third party [Deming], his heirs and assigns, forever, anything in the above instrument to the contrary notwithstanding.'

"Afterward, on the twenty-second day of April, 1886, a contract in writing was entered into between the defendant, the Fresno Canal and Irrigation Company, and the said Joseph G. Deming, in which it was provided that, in consideration of the sum of five dollars and other good and valuable considerations, said canal company agreed to furnish and thereby grant to said Deming all the water that might be required, not exceeding at any time eighty-three and one-third cubic feet per second, to be supplied by and through the canal known as the 'Mill Ditch,' on Fresno street, in the town of Fresno, county of Fresno, to the use of the said party of the second part, as a motive power to propel the machinery of a flouring-mill situated on said lots 28, 29, 30, 31 and 32 in block A of said town, together with the privilege of entering upon said canal and building and maintaining such proper and necessary works and machinery as might be proper in order to utilize said water and water power for the purposes of a flouring-mill, provided such use should not interfere with the flow of water in said canal. It is also agreed that the canal should be under the control of the canal company, and that it should have the right to use and enlarge the same, provided such use and enlargement should not interfere with the flow of water to the mill. It is also provided that said Deming should return all said water so used to the mill ditch, and not permit the same to run to waste, and not to use or permit the same other than as a motive power for said mill. It was also understood and agreed that the water to be used and granted was intended to form a part of the appurtenances of said mill and land, and that the right thereto should be transferable, etc. It is further covenanted and agreed, among other things, that the canal company might sell one thousand water rights of one cubic foot of water each, and if at any time the aggregate quantity of water in the canal of said company should fall short of one thousand cubic feet of water flowing per second, then said eighty-three and one-third cubic feet should represent eighty-three and one-third thousandths of said aggregate quantity, and said Deming should be entitled to receive water in that proportion. It is also covenanted that the agree-

ments and covenants in said contract should run with and bind said land and mill. There are a number of other stipulations in said contract, which, however, are contained in the contract first referred to herein, and are not now necessary to be noticed. Afterward said Deming conveyed all his right, title and interest in said property, and his rights under said contracts, to the Fresno Milling Company, the plaintiff herein.

“Plaintiff in this action claims that the assigned contract—the one dated the twenty-second day of April, 1886—was procured by fraud on the part of the Fresno Canal Company, and is, as to the plaintiff herein, null and void; that under the first contract made said Deming, or his successors, the plaintiff, was entitled to a deed in fee simple to said eighty-three and one-third cubic feet of water, to be used by said plaintiff in any manner that it should see fit. The contention of the defendant, on the other hand, is that the assigned contract was not obtained by fraud, but was entered into to take the place of the first contract, and for the purpose of more fully and precisely carrying out the views and intentions of the parties thereto; that it was never intended that the plaintiff should have any right to said water, excepting as a motive power to its mill. Without reviewing at length the evidence on this point, I think it clearly appears, not only from the terms of the contracts themselves, but from the other evidence in the case, that the second contract was not procured by fraud; that the parties to it understood fully its terms and effect, and that it fully expresses what the intentions of the parties were from the inception of the transactions complained of down to the time of their completion, and that it was intended by both parties thereto that it should take the place of the first contract; that they both entered into it with a full understanding of its terms and effects of the covenants therein contained. To mention a few of the many reasons for this conclusion, I would say that the amount of water, according to the evidence—eighty-three and one-third cubic feet per second—was worth for irrigation purposes, at the rates at which water was being sold at that time, over \$65,000, whereas the full purchase price agreed to be paid by the plaintiff for the use of said water, together with said four lots with the improvements thereon, was only \$20,500. It will also be understood that throughout the first instrument—because, as

to the terms of the second instrument, there can be no question—the expression constantly occurs that said water was to be furnished to said Deming for motive power to said mill, for the purpose of running said mill, etc. Further, that for several years after this contract was entered into, and water was being furnished to said mill, the milling company laid no claim to said water after it had passed its mill, and the defendant during all these years constantly and uninterruptedly appropriated said water to its own use, without any objection on the part of said milling company. Besides, the evidence clearly shows that the second contract was entered into deliberately by Deming, without a scintilla of proof tending to show that he was misled or overreached in any manner whatever. If this conclusion is correct, the fact, as contended by counsel for plaintiff, that the first contract operated as a grant from defendant to plaintiff, cannot alter the result, as it was simply a grant of water as a ‘motive power for said mill.’

“The remaining question which I shall notice in this decision is whether or not the defendant, the canal company, has furnished to said milling company, at their mill, the quantity of water agreed to be furnished by them, to wit, eighty-three and one-third cubic feet per second. The evidence upon this point, necessarily, from the nature of the case, consists mostly of expert testimony. That offered upon the part of the plaintiff—Mr. Grunsky—who seemed to be quite a competent witness upon such matters, tended to prove that the plaintiff failed to deliver the full amount of water agreed by it to be delivered, and that it only delivered some seventy and seventy-nine hundredths feet. The evidence upon the part of the defendant consisted of the testimony of Mr. Manuel and Mr. Eastwood, two scientific men, apparently as competent and disinterested to testify upon this question as Mr. Grunsky, and their evidence tended to prove that the defendant not only delivered as much as eighty-three and one-third cubic feet of water per second, but that the supply furnished by it far exceeded this amount, to wit, about one hundred and ten cubic feet per second. It also appeared in evidence, without contradiction, that the water-wheel of the plaintiff only had a capacity of some seventy-one and ninety-one hundredths feet, and defendant contends that, even if it had failed to deliver the full amount agreed to by it, the plaintiff has not

been damaged, for the reason that, if the water had been delivered, it could not have utilized the same. It would be an idle matter for me to review the evidence of these scientific witnesses upon this question by entering upon an extended criticism of their modes of procedure and the mathematical processes upon which their opinions are based. Suffice it to say that the witnesses on both sides, though adopting and using recognized and approved scientific tests, arrived at surprisingly different conclusions; and I am of the opinion, giving it full weight, and after a very thorough consideration of all the evidence offered by them, that the plaintiff has failed to prove by a preponderance of the evidence that the defendant has not delivered the amount of water agreed upon. Upon the contrary, the preponderance of the evidence is with the defendant that something over one hundred and ten feet of water has, during the times specified in said complaint, been delivered at the mill of the plaintiff. As I stated before, the evidence is uncontradicted that the plaintiff's water wheel only had a capacity of some seventy-one and ninety hundredths cubic feet per second, and, this being true, I am unable to see in what manner the plaintiff has been injured by a failure, even if it were true, of the defendant to deliver eighty-three and one-third cubic feet of water per second, when it had no means of utilizing more than seventy-one and ninety hundredths feet. Upon this point Mr. Grunsky says: 'It would not have been of any advantage to have had a larger quantity of water in the canal or in the mill ditch than there was at the time of my observations, for the reason that the excess could not have been carried away by the tail-race.' The canal company agreed to enlarge the canal below the mill so as to properly carry off the water delivered, and this it did. But there was no agreement that it would increase the fall at the mill, which was some thirteen feet to sixteen feet, which would have entailed an expenditure of over \$20,000, in order that the power and capacity of the mill might be increased. There is no evidence that such a thing was ever contemplated by the parties. This being true, of course the court is of the opinion that the plaintiff has not been damaged, and it is idle to consider what its profits would have been had its capacity and motive power been larger."

In addition to an answer upon the merits, defendant pleaded in bar a judgment rendered in an action entitled "City of Fresno *v.* The Fresno Milling Company and the Fresno Canal & Irrigation Company." When the judgment-roll in that case was offered in evidence, objection was made that it was not a final judgment, the time for appeal not having expired, and the motion for a new trial being then pending. We think the action of the court in overruling the objection error. A judgment, in order to be successfully pleaded in bar, must be a final judgment; not alone final as to the court which rendered it, but final as to the subject matter. We had occasion to discuss this question in *Re Blythe's Estate* (decision filed August 31, 1893), 99 Cal. 472, 34 Pac. 108, and are well satisfied with the rule of law there declared. The soundness of the doctrine finds no better illustration than is presented by the trial of the present case. The judgment which was here successfully pleaded in bar was subsequently reversed by this court. It is thus apparent how unsubstantial a thing it was, and how entirely insufficient to serve as a perpetual bar to further litigation. But the error of the court was harmless, for, as we have already seen, the defendant's cause is a just one upon the merits. The remaining objections to the admissibility of the evidence are not well founded. While the evidence in some respects may conflict, the findings all appear to find support therein. For the foregoing reasons, the judgment and order are affirmed.

We concur: McFarland, J.; Paterson, J.; Harrison, J.

BEATTY, C. J.—I concur in the conclusions of the court, except upon one point. I think it appears from the evidence, without substantial conflict, that the defendant has failed on several occasions, and for considerable periods of time, and without any sufficient excuse, to furnish the amount of water it contracted to furnish; also that it has failed to keep the canal below the plaintiff's mill clear and of sufficient capacity to carry the water away from the wheel, as it contracted to do—from all of which the plaintiff has suffered damage for which it is entitled to compensation. For these reasons I think the appellant should have been granted a new trial.

GROGAN v. NOLAN.

No. 19,348; April 10, 1894.

36 Pac. 397.

Mortgage Foreclosure—Costs.—Where an Attorney's Fee on foreclosure is taxable "in the bill of costs," an appeal from a judgment allowing costs, taxed at \$22.90, and plaintiff's attorney's fee, of \$100, is frivolous.

APPEAL from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Terrance Grogan against S. A. Nolan to foreclose a mortgage. Judgment for plaintiff. Defendant appeals. Affirmed.

Purington & Curtis for appellant; Curtis & Oster for respondent.

PER CURIAM.—Action for the foreclosure of a mortgage. Judgment was rendered in favor of the plaintiff, and the defendant has appealed from the judgment, without any exceptions. It was provided in the mortgage that "in the event of foreclosure of this mortgage, a reasonable attorney's fee shall be taxed by the court, and included in the bill of costs." Findings of fact were waived, and the court, in its judgment, fixed the sum of \$100 as the amount of attorneys' fees to be allowed the plaintiff, and directed that the property be sold, and that the proceeds be applied to the payment "of the expense of sale and costs of this action, the plaintiff's attorney's fee, of \$100, and the amount found due on said promissory note," and taxed the costs of the plaintiff at the sum of \$22.90. The only point presented in support of the appeal is that the stipulation in the mortgage did not give the court any authority to allow an attorney's fee, except as a part of the bill of costs, and that its action in making a special allowance in the decree was error. There is no merit in this proposition, and, as the appeal is evidently frivolous, the judgment is affirmed, and the sum of \$100 is allowed to the respondent, for damages, as a part of his costs on appeal.

CAFFREY v. OMILAK GOLD & SILVER MIN. CO.

No. 15,441; April 11, 1894.

36 Pac. 388.

Action for Services—Evidence.—In an Action for services rendered by plaintiff's assignor, the complaint alleged that they were rendered at the special request of defendant. Defendant, in its answer, admitted that the services were rendered, and set out a copy of the agreement between such assignor and its manager. Held, that it was not error to admit such agreement in evidence against an objection by the defendant.

Action for Services.—In Setting Forth the Agreement, Defendant alleged that it was made by G. "as" manager of defendant corporation. The agreement purported to have been made on defendant's behalf, and G. testified that he made it on behalf of defendant. Held, that an objection by defendant that it was on its face not its agreement, but the agreement of G., its manager, was not tenable.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by one Caffrey against the Omilak Gold and Silver Mining Company to recover for services rendered defendant by one Taggart, plaintiff's assignor. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Estee & Miller for appellant; A. Morgenthal for respondent.

HARRISON, J.—The plaintiff brought this action to recover for services rendered to the defendant in Alaska by his assignor, Taggart, between September 7, 1889, and September 22, 1891, for which he alleged that the defendant had agreed to pay the sum of \$75 per month for a portion of the time, and \$100 per month for the remainder. The defendant, in its answer, admitted that Taggart, the plaintiff's assignor, had rendered services to it, as specified in the complaint, during a portion of this period, and set forth a copy of the agreement between him and its manager, under which the services had been rendered, and alleged that by reason of the failure of Taggart to perform his part of said agreement it had suffered

damage in excess of the amount claimed by the plaintiff for said services. The case was tried by a jury, which rendered a verdict in favor of the plaintiff. A new trial was denied by the court, and from this order and the judgment the defendant has appealed.

Upon the issue whether the services had been rendered by Taggart during the period claimed in the complaint, as well as upon the issue whether he had been faithful in such service, the evidence is conflicting, and the verdict of the jury must be accepted as conclusive against the contention of the defendant. The claim in the answer that the defendant had suffered damage by reason of the acts of Taggart in an amount greater than the alleged value of the services was an affirmative defense, in which the burden of proof was upon the defendant, and we cannot say that the jury was not authorized in finding that this defense was unsustained by the evidence. The court left to the jury the determination of these questions of fact, and no exception was taken to its instructions. The court did not err in admitting in evidence the written agreement between Taggart and the manager of the defendant. The allegation in the complaint that the services had been rendered at the special instance and request of the defendant did not preclude the plaintiff from showing that such request, or the promise to pay for such services, had been in writing, or that a written agreement therefor had been made on behalf of the defendant with his assignor. The defendant had set forth a copy of the agreement in its answer, so that it could not have been misled as to the character of the averments, or as to the proof by which they were to be sustained; nor could the defendant object that the instrument contained other conditions to be observed by Taggart in the rendering of such services.

The objection by the defendant that the agreement was, upon its face, not its own agreement, but an agreement of Green, its manager, is not tenable. The defendant, in setting forth the agreement, had alleged that it had been made by Green "as manager of the defendant corporation." The agreement itself purports to have been on behalf of the defendant, and recites that the consideration for the agreement to render the services is the agreement by Green, "as manager of the said mining company, to pay me the sum of seventy-five dollars per month," etc. If there was any ambiguity in

the instrument itself, it was made clear at the trial by the testimony of Green that it was executed by him on behalf of the defendant, and the jury was authorized in finding that it was the agreement of the defendant. The judgment and order are affirmed.

We concur: Paterson, J.; Garoutte, J.

May 1, 1894.

PER CURIAM.—The judgment heretofore rendered upon the appeal herein is modified to read as follows: “The order appealed from is affirmed, and if, within fifteen days after the filing of the remittitur in the court below, the plaintiff shall file a stipulation remitting the sum of \$525 from the amount of the verdict, in accordance with the terms of the order, the superior court is directed to modify the judgment accordingly, and, as so modified, the judgment will stand affirmed. Costs of this appeal to be borne by the appellant.”

CRAMER v. KESTER, Road Overseer.

No. 15,191; April 19, 1894.

36 Pac. 415.

Injunction not to Remove Fence—Title of Plaintiff.—In an action to enjoin a road overseer from removing a fence, where defendant does not deny plaintiff's allegation of possession, but relies on an easement in the public as justifying him, plaintiff need not prove title, possession being sufficient upon which to maintain his action.

APPEAL from Superior Court, Monterey County; N. A. Dorn, Judge.

Action by Jos. Cramer against F. U. Kester, road overseer, to enjoin him from removing a fence. From a judgment for plaintiff and an order denying his motion for new trial, defendant appeals. Affirmed.

B. V. Sargent, district attorney, and S. F. Geil for appellant; W. A. Kearney for respondent.

SEARLS, C.—This is an action by Joseph Cramer against F. U. Kester, road overseer of Cholame road district, in the county of Monterey, to restrain the latter from destroying and removing a fence surrounding premises of the plaintiff. Plaintiff had judgment, from which, and from an order denying a new trial, defendant appeals.

Plaintiff, in his complaint, avers that he is the owner of, in the possession of, and entitled to the possession of the west half of the northwest quarter, section 8, township 24 south, range 13 east, Mount Diablo meridian, situate in the county of Monterey, state of California; that said land is inclosed by a substantial fence, and is valuable for raising crops of vegetables, cereals, and hay; that on November 2, 1891, the board of supervisors of Monterey county, claiming that there was a highway over said tract of land, passed an order directing the road overseer to open, and to keep open, for public travel, such public highway so claimed; that defendant is road overseer, has threatened, and will, unless restrained, tear down the fence, and open, and keep open, said alleged highway. The complaint then negatives the fact that a highway has ever been laid out or erected as a road or highway by order of the board of supervisors of said county, or that it has ever become such by use or dedication, or otherwise. The answer admits the ownership of plaintiff to all the land described in his complaint, except a strip which is defined by courses and distances, being a strip of about forty feet wide across said land, as to which defendant, on information and belief, denies plaintiff is the owner, or entitled to the possession of, and, upon like information and belief, avers it to be a public highway, to which the county of Monterey, a municipal corporation, is entitled to the possession and control of as such. The answer further avers, upon information and belief, that plaintiff will not lose any vested right, and that the said public highway was established upon the land, and that plaintiff and his predecessors acquired the same subject to the said easement, and not otherwise. There are other allegations in the complaint and answer, but they are not important to any question made on appeal. At the trial defendant called the plaintiff as a witness on behalf of the defense, and put to him the following questions: (1) "Does this piece of land described in your complaint belong to you, or your wife?"

(2) "Did you ever execute and deliver a deed or other document purporting to convey the land described in your complaint to your wife, after you purchased it from Davis?" Counsel for plaintiff objected to the evidence as incompetent, and not the best evidence. The objections were sustained, exceptions noted, and the rulings are assigned as error. There seem two answers to the contention of appellant:

1. If the proffered evidence was admissible for any purpose, it was to show that title had passed from plaintiff to his wife. This could only be proven by a proper conveyance in writing. "There can be no evidence of the contents of a writing, other than the writing itself," except in certain enumerated cases, of which this is not one. There are a few instances in which the fact that an instrument was executed or existed may be proven by parol, for some incidental purpose, as to fix the date of a transaction, and in which the contents of the instrument itself are not proffered as evidence. These are exceptions, however, to what may be regarded as one of the most clearly settled propositions of the law of evidence: *Rice on Evidence*, p. 145.

2. The ownership, possession and right to possession of plaintiff to the land described in his complaint are practically admitted by the pleadings. The answer expressly admits his ownership to the land, except as to that covered by the alleged highway, as to which it denies, upon information and belief, that he is the owner, or entitled to the possession, but, on the contrary, avers it is a public highway, and that, as such, the county is entitled to the control and possession of it. As before stated, the answer further avers that the locus in quo is a highway, and that the plaintiff and his predecessors in interest acquired the same subject to the easement. An easement or right of way over land does not constitute a title thereto; and we think it apparent that as the appellant did not deny the possession of plaintiff, which, in itself, is sufficient to maintain an action against a mere trespasser, and did justify the threatened entry only by pleading an easement in the public, of which the defendant was the representative, that the denials of the answer did not call for proof of title in the plaintiff. If defendant had no right to open the premises for highway purposes, possession in plaintiff was a sufficient title upon which to maintain the action. If defend-

ant possessed such right, title in the plaintiff could not defeat it. Counsel have devoted much space in their briefs to a discussion of the testimony and to quotations therefrom. It requires but a casual review of such testimony to show that it involved a substantial conflict upon all the material points, and, as the findings are full and explicit in favor of the plaintiff, the judgment and order appealed from should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

THOMPSON v. GORNER.*

No. 15,262; April 19, 1894.

36 Pac. 434.

Interest—Rate After Maturity.—Acceptance.—When interest on a note is payable at a certain rate monthly in advance, “and, if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at” a higher rate, acceptance of interest from time to time, for two years after maturity, at the former rate, waives the latter, though this be in no wise a penalty.

APPEAL from Superior Court, Alameda County; W. E. Greene, Judge.

Action by Mary Thompson against Christ Gorner on a promissory note. Judgment for plaintiff, with costs for defendant. Plaintiff appeals. Affirmed.

Edgar B. Haymond for appellant; John Yule and Edward H. Stearns for respondent.

SEARLS, C.—This is an appeal by plaintiff from a judgment in her favor for \$1,283.85, without costs, and for costs

*For subsequent opinion in bank, see 104 Cal. 168, 43 Am. St. Rep. 81, 37 Pac. 900, cited in note in Ann. Cas. 1912A, 1333, on payment and acceptance of principal sum as waiver of interest due by contract.

in favor of defendant. The whole contention arises upon the rate of interest due upon a promissory note, of which the following is a copy:

“\$1,400.

Oakland, Cal., March 20, 1888.

“On or before two years after date, for value received, I promise to pay Clarence J. Wetmore, or order, the sum of one thousand four hundred dollars in gold coin of the United States of America of the present standard, with interest thereon, in like gold coin, from the date hereof until paid, at the rate of eight per cent per annum, payable monthly in advance, and, if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of 1 per cent. per month; and in case said monthly interest, or any part thereof, is not paid within one month after the same becomes due and payable, then the whole of said principal sum and interest due thereon shall forthwith become due and payable at the option of the holder hereof. This note is secured by a mortgage bearing even date herewith.

“CHRIST GORNER.”

Plaintiff succeeded to the note, and a mortgage given to secure the payment thereof, by assignment before maturity. The interest on the note was paid when due, and was paid to plaintiff at the rate of eight per cent per annum, and accepted by her in full, until the twentieth day of February, 1892, when, upon the tender to her of one month's interest at said rate, she refused to receive the same in full, and claimed interest at one per cent per month, and demanded an additional four per cent per month on the principal from the maturity of the note, compounded, so as to make up, with that paid, one per cent per month. On the eighteenth day of March, 1892, and before the commencement of this action, defendant tendered to plaintiff \$1,283.85, which is conceded to be all that was due upon the note unless plaintiff was entitled to interest at one per cent per month, and upon the commencement of the suit defendant paid said sum into court for plaintiff. The facts are agreed upon.

The court below found, as conclusions of law: (1) That the promissory note provides for the payment of interest at eight per cent per annum, and no more, and that the clause therein that, “if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of one per

cent per month," is in the nature of a penalty, and may be waived, and that, defendant having failed to pay the principal sum when it became due, he is liable in damages at the rate of eight per cent per annum upon the principal sum remaining unpaid, and no more; (2) that plaintiff, having accepted the interest at eight per cent after the note fell due, in full payment, thereby waived her right to any or greater sum—and rendered judgment accordingly.

I cannot agree with the conclusion of the court below that the clause in the promissory note that "if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of one per cent per month," is to be treated as a penalty, but am inclined to regard it as a contract to pay one per cent per month upon a contingency which is shown to have occurred. It related, or might relate, to the interest to become due and payable under the contract; that is to say, before the maturity of the note as well as afterward. It may be said that all contracts for the payment of interest at a given rate are, in contemplation of law, confined to the life of the contract, and that after its violation a recovery is had not of interest as such, but damages for the violation of the contract, which are measured by the agreement of the parties as contained in their contract, or, in the absence of such agreement, by the law. Where there is no statute to prevent, parties may contract for such rate of interest as they choose, not only before the maturity of the contract, but after its breach, and until paid. By our Civil Code (section 1918), "parties may agree in writing for the payment of any rate of interest, and it shall be allowed, according to the terms of the agreement, until the entry of judgment." Again: "Interest is the compensation allowed by law, or fixed by the parties for the use, or forbearance, or detention of money": Civ. Code, sec. 1915. Under this section, parties in this state can as well agree upon the compensation to be fixed for forbearance to enforce the payment of money due after a breach of contract as for its use before such breach, and, when agreed upon in writing, it is equally binding in the one case with the other: *Hubbard v. Callahan*, 42 Conn. 524, 19 Am. Rep. 564; *Wilkerson v. Daniels*, 1 G. Greene (Iowa), 179; *Wernwag v. Mothershead*, 3 Blackf. (Ind.) 401. In the case last cited, the makers of the note agreed, if not paid at maturity,

“to pay five dollars interest per week until paid”; and the court held it drew interest at the agreed rate until paid. A vast number of cases might be cited, all to the effect that similar provisions in promissory notes are to be enforced as per contract, and not treated as penalties. It follows from this view that upon the maturity and nonpayment of the note the contingency occurred upon which she was entitled to interest thereon at one per cent per month.

But upon the facts of the case as they appear of record it does not follow that she can recover such interest in this action. For two years next after the maturity of the note plaintiff continued to receive the interest monthly in advance at the rate of eight per cent per annum, which was “accepted in full payment of interest due on said note from the date of such payment to the twentieth day of each month next succeeding such payment.” This was clearly a waiver of her right to the larger interest. “A waiver takes place where a man dispenses with the performance of something which he has a right to exact. A man may do that not only by saying that he dispenses with it—that he excuses the performance—or he may do it as effectually by conduct which naturally and justly leads the other party to believe that he dispenses with it. There can be no waiver unless so intended by one party, and so understood by the other, or one party has so acted as to mislead the other”: 2 Herman on Estoppel, sec. 825. The same author, at section 1020 of volume 2, says: “No one who waives or dispenses with the performance of a contract can rely upon the failure to perform it, either as a defense or cause of action, for no one can complain of a default which he has caused or sanctioned.” In *Bradford v. Hoiles*, 66 Ill. 517, a note was given for \$1,000, payable ninety days after date, with the following clause: “And, if the sum is not paid when due, to pay thereon five per cent per month as damages thereon from the time the same is due until paid.” The maker paid interest on the note from July, 1869, to September 8, 1870, which, from the indorsements, was shown to be at ten per cent per annum, and to have been in full. The maker then died, and two years later, in an action on the note, the court held that the holder, when the first interest was due, might have demanded the stipulated damages at five per cent per month, but that having then, and from time to time thereafter while

the maker lived, received ten per cent per annum interest, this was inconsistent with a claim of five per cent per month for damages, and was evidence of an agreement to accept ten per cent per annum instead of five per cent per month, and was a waiver of the penalty. It is true that the court there regarded the five per cent per month as a penalty. It is also true that courts more readily lean to a waiver, in cases of penalty, than in those of the ordinary provisions of contracts. Still, in the present case I am of opinion the conceded facts are strong enough to raise the legal presumption, not only that plaintiff had waived the right to the higher interest, so far as she accepted the lower rate specified in the note, but that the waiver evinced by a uniform course of conduct for two years extended to and estopped her from the very right to demand the higher rate of one per cent per month for the month commencing February 20, 1892. The interest was payable monthly in advance. When, on the twentieth day of February, 1892, defendant tendered the interest (\$8.70) which, by uniform usage, had come to be the conceded amount due, it operated as a payment as effectively as though received, subject to the duty devolving upon defendant of keeping the tender good. This he did by paying the amount into court for plaintiff. The judgment appealed from should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

BARTLETT et al. v. O'CONNOR et al.

No. 15,399; April 19, 1894.

36 Pac. 513.

Waters—Diverting from Another by Draining Marsh.—Where one, in draining a marsh from which a stream runs onto another's agricultural land, in connection wherewith it has been used for irri-

gating and domestic purposes from time immemorial, diverts the water intentionally and without benefit to himself, he will be enjoined.

APPEAL from Superior Court, Mendocino County; R. McGarvey, Judge.

Suit by James Bartlett and others against Cornelius O'Connor and others for damages and an injunction. Judgment for plaintiffs. Defendants appeal. Affirmed.

J. M. Mannon for appellants; J. A. Cooper, J. Q. White and W. P. Thomas for respondents.

VANCLIEF, C.—Action to recover damages for diversion of water from an alleged spring and natural stream, and to enjoin the defendants perpetually from such diversion. Judgment passed for plaintiffs, enjoining the defendants as prayed for, and for costs, but without damages. The defendants appeal from the judgment, and from an order denying their motion for a new trial.

The material facts are as follows: In February, 1891, the plaintiffs, being the owners of a large tract of land in Mendocino county, sold and conveyed a parcel thereof (one hundred and thirty acres) to the state of California, to be occupied and used as the site for the Mendocino State Asylum for the Insane. Upon the parcel thus sold to the state is a marsh or bog of about three acres, out of which arises a considerable quantity of water, which runs off from the west side of the bog, through a natural channel, across plaintiffs' adjoining land. The channel is hardly perceptible within the marshy land, but becomes distinct at the western edge thereof, and thence so continues through plaintiffs' land. The court found that at the head of the natural channel is "a living spring of water, . . . and that at the place, and in the vicinity of said spring, a large quantity of water rises and forms the source of a living stream of water; that the said water from said spring flows off in a natural, well-defined channel, through and over the lands of plaintiffs, and has been so wont to flow onto and over the lands of the plaintiffs in a natural and well-defined channel from time immemorial"; and that plaintiffs' lands are agricultural lands; and that the said water flowing

through said natural channel has been used by plaintiffs for domestic purposes and for irrigation continuously for more than twenty years, until diverted by defendants in 1891. The court further found that in 1891 "the defendants willfully, and for the express purpose of drawing off the water that formed the spring, being the source of said natural stream, and for the purpose of drawing off said water and diverting it from said natural stream, cut an artificial ditch in and near said spring, and at a point before said water reaches the lands of the plaintiffs, and turned said water into said ditch, and diverted it from its channel and said ditch and away from the stream in which it formerly flowed, so as to greatly diminish the quantity of water so flowing from said natural stream through and over the lands of the plaintiffs; and the defendants threaten to continue, and will unless restrained by this court continue, to divert said water from said natural stream and from the spring, the source of said natural stream, so as to diminish the natural flow of water from said stream, to the great and irreparable injury of plaintiffs." It is further found that the ditch dug by defendants is on the land purchased by the state from the plaintiffs, and the defendants were directors of said state asylum at the time they dug said ditch. The defendants testified that the water diverted through the ditch was not used or intended to be used for any purpose, and that the sole object of the diversion was to drain and reclaim the land for the purpose of cultivating the same. In answer to this the plaintiffs proved, and the court found, that, if the object was merely to drain the marsh, it could have been accomplished at much less expense by deepening the natural channel and outlet, in which there is a fall of eighteen inches in the first sixty feet from the head, in the first one hundred and thirty feet a fall of three feet, in the first three hundred feet a fall of four and one-half feet, and in the first five hundred feet a fall of six feet and five inches; whereas, in the first four hundred feet on the line of the ditch dug by defendants there is no fall. The head of the ditch dug by defendants is between twenty-five and thirty feet distant from the head of the natural channel, at which point it is three feet deep; and at a distance of four hundred feet from that point it is from five to six feet deep. Then, connecting with the head of the ditch, at right angles therewith, is a ditch about

thirty-four feet long, and another of the same length, and parallel therewith, about fourteen feet therefrom, the natural effect of which is to divert water from the natural channel. These measurements were made and testified to by a surveyor, and were not disputed; so that the finding of the court that the object—at least one object—of the defendants was to divert the water from the natural channel and away from the plaintiffs' land by considerable unnecessary labor and expense if their only object was to drain the land, is amply justified by the evidence. And although the court, in its findings, did not use the word "malice," yet it substantially found that the defendants intentionally, unnecessarily, and without benefit to themselves or others diverted the water to the injury of the plaintiffs. This the law characterizes as a malicious injury. Conceding that defendants were entitled to drain the land for the purpose of cultivating it, yet if, without inconvenience or extra expense, they could have adopted a mode or means of drainage not injurious to others, they had no right to adopt a mode which was not only injurious to plaintiffs, but intentionally so, as found by the court. In view of this conclusion it becomes necessary to consider the question principally argued by counsel, namely whether the defendants diverted only such water as percolated through their own land or that of their principal, the state. I think the judgment and order should be affirmed.

We concur: Temple, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

MONTEREY COUNTY v. SEEGLEKEN et al.

No. 15,076; April 19, 1894.

36 Pac. 515.

Specific Performance—Conditions Precedent.—A covenant in a contract to convey land to a county for a highway and bridge, binding the county to furnish a cattle-way to the river, need not be performed in advance as a condition to a conveyance.

Appeal—Review.—Findings of Fact by the Trial Court will not be reviewed on appeal.

Reformation of Deed.—The Discretion of the Trial Court in Granting the reformation of a deed will not be reviewed, except in a very plain case.

APPEAL from Superior Court, Monterey County; John K. Alexander, Judge.

Action by Monterey county against John and Henry Seegleken to reform a deed. From a judgment for plaintiff, defendants appeal. Affirmed.

W. A. Kearney for appellants; B. V. Sargent, S. F. Geil and J. J. Wyatt for respondent.

TEMPLE, C.—This action was brought to reform a deed. Plaintiff avers that it purchased from the defendants a tract of land, which the complaint specifically describes, for the consideration of \$1,000, which was then paid to the defendants; that on the day on which it paid said money to defendants they executed a deed to it, intending thereby to convey the tract of land above alluded to, but, through the mistake of the scrivener in writing the deed, they in fact conveyed to plaintiff, contrary to the agreement and understanding of the grantors and grantee, another tract, which is also specifically described in the complaint; that the mistake was not discovered by plaintiff for several months after the execution of the deed; that defendants refused to rectify the mistake by executing a deed for the tract of land which plaintiff purchased; wherefore plaintiff demands a decree that the deed be reformed, and for such relief as may be just and equitable. The answer is a general denial. The court found for plaintiff all the facts averred in the complaint, but it also found that, as part of the consideration for the deed, plaintiff agreed to give to defendants a sufficient cattle-way from their lands to the Salinas river, between the bridge across Salinas river and the lands of F. S. Spring; and that plaintiff had not complied with that part of its agreement, and had not left a sufficient cattle-way for defendants to the river. Thereupon an interlocutory order was made, requiring plaintiff to provide a cattle-way according to the agreement and to the approval

of the court, which, when done, would entitle plaintiff to the decree as prayed for. Subsequently a final decree was entered, in which, among other things, it is recited that a cattle-way has been provided for defendants. The decree then proceeds to award the relief prayed for. Defendants moved for a new trial, and now appeal from the order denying their motion. Three points only are made on this appeal: (1) The alleged contract was not proven, and the contract which was proven had not been performed by plaintiff; (2) the contract proven is so uncertain and indefinite that a court of equity will not enforce it; and (3) the misunderstanding, if there was any, was not mutual.

The county of Monterey, the plaintiff, purchased the land for a highway. It is a strip sixty feet wide along the river, at the westerly termination of which, it appears, a bridge was to be built across Salinas river. The plaintiff contends that the strip purchased extended to Spring's land, which is some ~~one~~ hundred feet farther down the river than the strip described in the deed extends. The bridge was built by the county below the land described in the deed, and within about thirty feet of Spring's boundary.

1. The charge that the contract alleged was not proven, and that the contract proven had not been performed by plaintiff, has reference to the finding that one consideration for the deed was a covenant to furnish a cattle-way to Salinas river. There is a slight misapprehension here, I think, on the part of appellant. The consideration was not the cattle-way, but the agreement to furnish one. The way was to be upon the very land conveyed, and was an agreement to allow the defendants the use of so much of it as would afford a cattle-way. In the nature of things, the contract could not be performed until after the conveyance was made; therefore, it was not a covenant which it was incumbent upon the plaintiff to perform before it became entitled to a conveyance. Since, however, the plaintiff had taken possession and had constructed its bridge, and not left a convenient cattle-way, it was proper for a court of equity to require it to do so before reforming the deed. Considering the proceeding, however, as a suit for specific performance, and the act one which plaintiff was required to perform before being entitled to his deed, the result would be the same. According to some of plaintiff's wit-

nesses, the bridge was located without objection on the part of defendants. The county had performed the most important part of its contract, had expended considerable money on the land, and the act for which plaintiff was in default could still be performed. It does not appear that inconvenience or loss has resulted from the delay. The plaintiff had already provided a cattle-way which it claimed was sufficient, but the court, holding otherwise, granted the relief conditionally. Defendants are not injured: *Hoppough v. Struble*, 60 N. Y. 430.

2. I presume that appellant, by his second point, really means that the proof that a mistake was made is insufficient; that the proof was so balanced that the court could not say with sufficient certainty that a mistake had been made. This was a question almost entirely for the court below. Unless the evidence be clear and convincing, the trial court should decline to grant the relief. But, in the nature of things, it must be a very plain case to justify the interference of this court with that discretion: *Ward v. Waterman*, 85 Cal. 504, 24 Pac. 930.

3. The point that the mistake was not mutual is perhaps the same point in a different form. The evidence of the members of the board of supervisors is quite clear as to their understanding. Looking only to the testimony on the part of the plaintiff, it is equally clear as to the understanding of John Seegleken. As I understand the evidence, the controversy concerns him, and not the other defendant. Field and Sheehy, who were members of the board of supervisors of Monterey county when the land was purchased, testified for plaintiff very clearly and positively as to the understanding of John Seegleken. Certain witnesses for the defendants contradicted this testimony, but that only made a case of conflict, and this court will not interfere. I advise that the order be affirmed.

We concur: Vancielief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

SHEEHY v. CHALMERS.

No. 15,324; April 23, 1894.

36 Pac. 514.

Action on Note—Judgment Payable in Gold Coin.—Under Code of Civil Procedure, section 667, providing that judgments in suits on contracts or obligations in writing for the direct payment of money may be made payable in the kind of money specified therein, a judgment payable in "U. S. gold coin" is not erroneous, when the note on which it is rendered is payable in "U. S. gold coin."

Action on Note—Admission of Execution in Answer.—Where the answer to a complaint on a promissory note expressly admits its execution, it is unnecessary to introduce it in evidence.

APPEAL from Superior Court, Santa Cruz County; J. F. McCann, J.

Action by James Sheehy against W. P. Chalmers on a promissory note. From a judgment for plaintiff, and an order dismissing his motion for new trial, for want of prosecution, defendant appeals. Judgment and order affirmed.

Eugene N. Deuprey for appellant; Julius Lee for respondent.

BELCHER, C.—On January 5, 1891, the defendant executed to the plaintiff his promissory note, whereby he promised to pay plaintiff, one day after date, \$1,050 "in U. S. gold coin," with interest, etc. On December 1, 1891, the plaintiff commenced this action to recover the amount due on the note, and prayed judgment for the amount "in the gold coin of the United States." The complaint was verified, and a complete copy of the note was set out therein. The answer of the defendant "admits the making of the promissory note alleged and set forth in said complaint," and the only defense interposed is an allegation "that it was understood and agreed that the sum sued for in this action was not to become due or payable until after the defendant herein had received sixty days' previous notice, which notice should be given by plaintiff to defendant before the same should become due or

payable"; and a further allegation "that the plaintiff failed and neglected to give sixty days' notice, and that the said sum sued for in this action, and that said promissory note, is not due or payable, and that the action herein is premature." At the trial the plaintiff testified that he was the owner and holder of the note sued upon, and that no part of it had been paid, and then rested his case. The defendant thereupon moved for a nonsuit, upon the ground "that there had not been any alleged promissory note, or aught pertaining thereto, introduced in evidence." The court denied the motion, and evidence relating to the affirmative defense set up in the answer was then introduced by both sides. The court found, among other things, "that there was not at any time any understanding or agreement whatever between the parties hereto respecting said note sued on, or the time of the payment thereof, other than, or different from, that expressed in said note," and gave judgment for the plaintiff according to the prayer of his complaint. The defendant moved for a new trial, which was dismissed for want of prosecution, and has appealed from the judgment and order dismissing his motion. Two points only are made for a reversal. They are (1) that the judgment was erroneous in so far as it made the amount adjudged to be due payable "in the gold coin of the United States"; and (2) that the court should have granted the defendant's motion for a nonsuit because, "at the trial, no note was offered in evidence, and there was no attempt to account for its absence."

1. The code provides that: "In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein": Code Civ. Proc., sec. 667. This action was a contract in writing for the direct payment of money, made payable in "U. S. gold coin." There was no error, therefore, in making the judgment payable in the kind of money specified in the contract: *Carpentier v. Atherton*, 25 Cal. 564.

2. It was not necessary to introduce the note in evidence, or to exhibit it at the trial. Its execution was expressly admitted by the answer, and the rule is elementary that no proof

is required as to matters not in issue. It is said that "the plaintiff totally ignored the law as to the distinction between primary and secondary evidence," but no question as to primary and secondary evidence arose in the case. No good purpose would have been subserved by producing the note, and the court, therefore, did not err in denying the motion for nonsuit. We see no merit in the appeal, and advise that the judgment and order be affirmed.

We concur: Vanelief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed, and the respondent is allowed \$50 damages as a part of his costs on the appeal herein.

BLANCHARD v. PACIFIC ROLLING-MILL CO.

No. 15,430; April 24, 1894.

36 Pac. 584.

Goods Sold to Arrive by Ship—Delivery—Delay—Expenses.—

Where plaintiff sold to defendant iron, to arrive by a certain ship, then on her way—the iron to be delivered at defendant's wharf, and received by him, as discharged—defendant is liable to plaintiff for the necessary charges paid by him for the use of the ship and wharfage while awaiting, after arrival, opportunity to discharge, defendant's wharf being occupied by other vessels.

APPEAL from Superior Court, City and County of San Francisco; Eugene R. Garber, Judge.

Action by J. O. Blanchard against the Pacific Rolling-mill Company. Judgment for plaintiff. Defendant appeals. Affirmed.

T. Z. Blakeman for appellant; Page & Eells for respondent.

GAROUTTE, J.—Maeondray & Co. sold to defendant, Pacific Rolling-mill Company, five hundred tons of scrap iron, to

arrive by ship "Titan," then on her way to San Francisco from Hongkong, said iron to be delivered to defendant at defendant's wharf, and received by purchaser from the ship's side when discharged. The ship arrived in due course, and defendant was notified that the iron was on board, ready to be discharged, but, owing to the fact that defendant's wharf was occupied by other vessels, Macondray & Co. were unable to deliver the iron for several days after its arrival, and after the ship was ready to discharge it. Owing to this delay Macondray & Co. were compelled to pay the owners of the ship for the use thereof while said iron remained in the hold awaiting discharge and delivery, and also were compelled to pay an additional amount for wharfage, the entire sum being \$724.70. The plaintiff, as assignee of Macondray & Co., sued the defendant and appellant for the amount of money so expended. This amount so paid to the master of the ship was found by the court to be a reasonable charge for such use. The foregoing facts are all substantially found by the court, and we think the evidence is entirely sufficient to sustain the findings as to such matters. The case of *Dibble v. Corbett*, 5 Bosw. (N. Y.) 202, seems to be directly in point as to all the questions here involved. In that case the following instruction of the court was upheld: "The rule of damages in this case does not depend upon the charter-party of the schooner, but the plaintiff's right to have simply the necessary expenses of taking care of the property, and keeping it, during the period of unreasonable delay, and nothing more can be recovered." And again: "It does not excuse the defendants for delay in receiving the goods that their vessel was not in readiness to receive them. If the defendants designated the 'Valleyfield' as the ship to receive the goods, and that vessel was not ready, it was their duty to find another, or receive the goods at some other place": See, also, *Story on Sales*, secs. 394, 404. If Macondray & Co. were liable to the owners of the vessel for the use of the hold for storage purposes, then this defendant is liable to Macondray & Co. to the same extent, for such would be the amount of damage actually suffered by them. The evidence discloses that the charge made by the owner of the ship was a customary charge, and also a reasonable charge, under the circumstances of the case; and, as we have seen, the court finds the charge

to be a reasonable one. We think the liability of Macondray & Co. to the master of the ship necessarily follows from these facts, and, such liability existing, the liability of the defendant to Macondray & Co. follows, as a matter of course. For the foregoing reasons it is ordered that the judgment and order be affirmed.

We concur: Harrison, J.; Paterson, J.

DORMAN v. SOTO.

No. 15,478; April 24, 1894.

36 Pac. 588.

Sale—Change of Possession—Attachment.—Where plaintiff's son in law gave to her a bill of sale of articles on his ranch, which remained there and were used by him, there was no delivery and change of possession that would defeat an attachment of the property in an action against the son in law, though, with the bill of sale, there was given to plaintiff a deed of an undivided half of the ranch, and, before the attachment, plaintiff visited her son in law.

APPEAL from Superior Court, Contra Costa County; Joseph P. Jones, Judge.

Action by Asenath Dorman against Frank Soto. Judgment for plaintiff. Defendant appeals. Reversed.

R. H. Latimar and C. Y. Brown for appellant; W. S. Wells and Cary Howard for respondent.

VANCLIEF, C.—This action was brought to recover certain personal property (eight horses and forty tons of hay), or the value thereof. The defendant appeals from the judgment in favor of plaintiff, and from an order denying his motion for a new trial. The defendant, a constable, justifies the taking and detention of the property by virtue of a writ of attachment issued by a justice of the peace at suit of Williams against Thurber and wife, alleging that the horses and hay

were the property of Thurber and wife, and denying that plaintiff was the owner or entitled to the possession thereof. Plaintiff claimed title to the property by purchase from Thurber and wife, Thurber being her son in law. The purchase was evidenced by a bill of sale executed by the husband alone, as follows:

“Know all men by these presents: That for and in consideration of the sum of one dollar (\$1) to me in hand paid, and other valuable consideration to me moving, I have this day sold, assigned, set over, transferred and delivered unto Asenath Dorman (widow), of Alameda county, state of California, the following described personal property, now in Contra Costa county, state of California, on the premises this day conveyed by myself and Ellen D. Thurber (my wife) to said Asenath Dorman, to wit: Eight work horses; all hay on said premises owned or belonging to me.

“Witness my hand this 20th day of August, 1892.

“A. S. THURBER.

“Witness: CARY HOWARD.”

The appellant contends that there never was any delivery of the property described in the bill of sale, and consequently that the transfer was not followed by any actual change of possession, and is therefore void as against Williams, the attachment creditor; and I think this point is well taken. Since it appears that, at the time of execution of the bill of sale, Thurber and wife had the possession and control of the property, were then indebted to Williams, the plaintiff in the attachment suit, and that the attachment proceedings were regular, the burden of proving an immediate delivery, followed by an actual and continued change of possession of the property described in the bill of sale, devolved upon the plaintiff. Yet there is no evidence sufficiently tending to prove a delivery and continued change of possession to raise a substantial conflict with the evidence to the contrary. Indeed, it is neither alleged, nor found as a fact, that there was any delivery or change of possession. But conceding that an allegation and finding that plaintiff was the owner, and entitled to the possession, is sufficient to uphold the judgment, yet such finding is not justified by the bill of sale alone, which was executed in Oakland, Alameda county, while the property described therein was on Thurber's ranch, in Contra Costa

county. The plaintiff rested her case on the bill of sale and her own testimony. Her testimony in chief is as follows: "I am the plaintiff in the above-entitled action. This paper [paper shown witness] was delivered to me by A. S. Thurber on the twentieth day of August, 1892. It is a bill of sale for property contained in the complaint. I continued to be the owner of this property on the eighth day of September, 1892." Cross-examination: "I live in Oakland, and sometimes in Alameda. I have lived in Oakland for about the last six years continuously. My home has been with my daughter, Mrs. Soto, in Oakland; but since Mrs. Thurber has moved to Alameda, I have visited some at her house. I have lived with my daughter, Mrs. Soto, in Oakland, and stop sometimes with my daughter, Mrs. Thurber, wife of A. S. Thurber. The bill of sale was made and delivered to me on the twentieth day of August, 1892, at my daughter's home in Oakland, by A. S. Thurber. The consideration of this bill of sale was \$20 in money, and, A. S. Thurber being my son in law, I went on his note for \$5,000 to \$6,000; and this transfer was to pay me for the \$20 in money which I had already paid him, and which I may be called upon to pay out on any of the notes which I had indorsed for him. The horses and hay were on the ranch known as the 'Treat Ranch,' in Contra Costa county, state of California. At the time the bill of sale was made, I was very intimate with A. S. Thurber, he being my son in law. I visited at his home, and I was getting uneasy about his affairs—whether his fruit crop would be sufficient to pay off his indebtedness and the notes I went security for, so I would be released—and he was getting uneasy about not being able to pay off his debts, and about being able to release me; and I wanted a bill of sale of his personal property, because I thought I might have to pay these notes I went security for him. This stock was kept on the ranch continuously, and is there yet. I went to the Thurber ranch a few days after the receipt of the bill of sale from Thurber to me, and stayed there until about November 13, 1892, when I left on business. I stayed there until I came down to Martinez to pay my taxes; and the sheriff met me down there, and served a summons on me in the Treat suit. Then I went to Oakland to hunt me a lawyer, to know what to do. Then I caught cold, and was detained in Oakland. I put my son, Charles Dunn, in charge

of the property for me, when I received the bill of sale, and he stayed there all the time. I went to the ranch soon after the bill of sale was made, and stayed there until November. Mr. and Mrs. Thurber remained also until I left, about the thirteenth day of November, 1892, when they moved to Alameda." The testimony on the part of the defendant showed that Thurber used the property on his ranch after the execution of the sale, continuously, until it was attached, as he had used it before. The plaintiff, in rebuttal, testified: "I sent this paper to my son Charles Dunn about the time I bought the property from Thurber.

" "Oakland, Cal., August 20, 1892.

" "Chas. Dunn, Esq., Concord, Cal.—

" "Dear Sir: You are hereby requested and directed to take possession of the land and premises next formerly owned by Alfred S. Thurber and wife, near Concord, with all personal property thereon, owned or claimed by them, or either of them, except wearing apparel and household furniture, and the same to hold, as my agent, and subject only to my orders and control.

Yours truly,

" "ASENATH DORMAN.' "

Charles Dunn, having been called as a witness for defendant, testified: "I lived during the year and fall of 1892 on the Treat ranch. Thurber and wife lived there also. ["Treat Ranch" being the name of the ranch owned by Thurber and wife.] I claimed an undivided one-half of the hay Soto attached, . . . and served notice on Soto, the constable. The other half belonged to Mrs. Thurber, wife of A. S. Thurber. . . . The share of Mrs. Thurber was hauled away in November, 1892." Being called by plaintiff in rebuttal, Charles Dunn testified that his mother's letter to him of August 20, 1892, was given to him by Mr. A. S. Thurber a few days after its date; but he did not testify that he took possession or charge of the property for the plaintiff, or that he did anything directed by that letter, nor is there any evidence that he did. On what ground he claimed one-half of the hay at the time of the levy does not appear, nor why, if the other half belonged to Mrs. Thurber, as he testified it did, her half was not subject to the attachment. Plaintiff, also, in rebuttal, introduced a deed to her from Thurber and wife for one-half of the Treat ranch, undivided, which appeared to have been

recorded August 22, 1892; and it is claimed by appellee that this deed was sufficient evidence of a delivery and continuous possession of the horses and hay described in the bill of sale, as they were on the ranch from the date of the bill of sale until they were attached. But this contention is answered by several cases in this state: Cahoon v. Marshall, 25 Cal. 197; Bunting v. Saltz, 84 Cal. 168, 24 Pac. 167. I think the judgment and order should be reversed and a new trial granted.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial granted.

BYGUM v. SOUTHERN PAC. CO.

No. 15,222; April 29, 1894.

36 Pac. 415.

Railroad—Injury at Crossing.—In an Action Against a Railroad company to recover for the death of a boy between five and six years of age, where the evidence tended to show that he was killed at a public crossing in a town of between two thousand and three thousand people, by being run over by defendant's passenger train, which was running from fifteen to forty miles an hour, the questions of the company's negligence and the contributory negligence of the boy and his parents are for the jury.

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Carl C. Bygum against the Southern Pacific Company for damages for causing the death of his minor son. From an order granting plaintiff a new trial, after nonsuit, defendant appeals. Affirmed.

Jas. C. Martin and A. A. Moore for appellant; Jennings & Hubbs for respondent.

PER CURIAM.—This is an appeal by the defendant from an order granting the plaintiff a new trial after a judgment of nonsuit had been entered against him. The action was brought to recover damages for the death of plaintiff's son, alleged to have been caused by the negligence of the defendant, its servants and employees, in operating its railroad. The boy was between five and six years of age, and, when attempting to cross defendant's railroad track, was struck by a moving engine, and instantly killed. The complaint alleged that the accident which resulted in the death of the boy occurred about 1 o'clock in the afternoon, at the crossing of the railroad and University avenue, in the village of West Berkeley, Alameda county. The answer denied that the accident occurred at the crossing named in the complaint, or at any public crossing of the railroad; denied that it occurred by reason of any negligence or fault on the part of the defendant or its servants and employees; and alleged that it occurred solely by and through the negligence of the boy and his father, the plaintiff. The nonsuit was granted upon the theory that the accident did not occur at a street crossing, and that the case came within the rule declared in *Toomey v. Railroad Co.*, 86 Cal. 374, 10 L. R. A., N. S., 139, 24 Pac. 1074; but after hearing the motion for new trial the court was of the opinion that the evidence as to where the accident occurred, and as to whether it was caused by the negligence of the defendant, or by the negligence of the boy and his parents, should have been submitted to the jury, and therefore granted the motion.

There was evidence tending to show that West Berkeley was a village situated partly on both sides of the railroad, and having a population numbering from two to three thousand; that University avenue crossed the railroad and was the principal street of the village, and was much used by people passing over it with teams and on foot; that the boy, when struck by the engine, was on that street, and was attempting to cross from the east to the west side of the railroad track; and that the engine which struck him was hauling a belated west-bound passenger train, and was running at the rate of from fifteen to forty miles an hour. The issues in the case were: Was the accident caused by the negligence of the employees of the defendant? And did the negligence of the boy and his

parents proximately contribute to it? Upon these issues, we think there was evidence sufficient to entitle the plaintiff to have them submitted to the jury, and that the court properly so held, in granting the motion for new trial. Negligence is generally an inference from facts and circumstances, which it is the province of the jury to find; and, in an action for damages for injury caused by negligence, a nonsuit upon the ground of contributory negligence should only be granted when, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in his favor must necessarily be set aside. And the negligence of parents in allowing their child to be alone in the street does not relieve the defendant from liability, if the injury occurred through the gross negligence of its employee: *Schierhold v. Railroad Co.*, 40 Cal. 447. On a trial before a jury in an action for negligence, a nonsuit should not be ordered by the court unless there is no evidence at all, or a mere scintilla of evidence, wholly insufficient for the consideration of the jury: *Wilson v. Railroad Co.*, 62 Cal. 164. And when a nonsuit is improperly ordered and a motion for new trial is made, it should be granted: *Alvarado v. De Celis*, 54 Cal. 583. It follows that the order appealed from must be affirmed, and it is so ordered.

BUTTNER v. SMITH.

No. 15,427; April 30, 1894.

36 Pac. 652.

Options—Acceptance.—Defendant Gave Plaintiff a Written Option to purchase stock for \$3,100 cash and the balance on time. On the last day of the option plaintiff said he would take the stock "according to the terms of the writing," but defendant, desiring time to get a portion thereof from one to whom it was pledged, indorsed an extension of eleven days on the agreement. After such extension, plaintiff let defendant have \$3,100 to get the pledged stock, but he failed to do so, and, after the expiration of the option, demanded the return of the \$3,100. Held, that there was no binding acceptance of the option.

Option.—Plaintiff is Entitled to Interest on the Sum sought to be recovered from the date of his demand for its return.

APPEAL from Superior Court, Santa Clara County; John Reynolds, Judge.

Action by Buttner against Smith to recover money paid defendant to assist him in getting possession of stock. From a judgment for plaintiff and another denying a new trial defendant appeals. From an order denying plaintiff's motion to add to the verdict interest on the amount from the date demand was made for its return to the date the action was begun, plaintiff appeals. Order denying a new trial affirmed and judgment modified.

Kittridge & Krafft for appellant; Thomas V. Cator for respondent.

HARRISON, J.—The appellant gave to the respondent the following agreement:

“San Jose, Cal., May 24, 1889.

“I hereby grant to J. C. Buttner or assigns five days' refusal to purchase 490 shares of Union Mill and Lumber Co. stock for the sum of \$15,100 on the following terms, to wit, \$3,100 down on or before the 29th day of May, 1889, at 3 P. M.; \$1,000 payable every six months thereafter, with interest on the whole balance, payable every six months, and the said 490 shares as security, and 20 shares additional; making 510 shares in all. . . .

“CHAS. C. SMITH.”

On the 29th of May the appellant desired further time to arrange about some of the stock that was held by one McCoy in pledge for an indebtedness of his, and made the following indorsement upon the foregoing instrument:

“San Jose, May 29, 1889.

“The within agreement is hereby continued until the 9th day of June, 1889, at 3 o'clock P. M.

“C. C. SMITH.”

This indorsement was made at the Garden City Bank, in San Jose, which at the same time held one hundred and seventy shares of the stock in pledge for an indebtedness of the appellant, and where the respondent also had some money on deposit. After the above transaction, Buttner told Smith that

he had some money to his credit at that bank, and, upon Smith's statement, in reply to Buttner's suggestion, that if he would let him have the money it would help him to get that stock, Buttner let him have \$3,100. About ten days after this time, Smith saw Buttner, and told him he could not get the stock from McCoy; and about two weeks later Smith again went to Buttner, and proposed a change in the contract, by which Buttner could get the stock in some other way. This, however, was declined by Buttner. Smith failed to get the stock from McCoy, and, in August, Buttner demanded that he pay back the \$3,100, and, upon his refusal, brought this suit. The case was tried before a jury, and a verdict rendered in favor of the plaintiff. From the judgment entered thereon, and from an order denying a new trial, the defendant has appealed.

As the accounts of the interviews and of the conversations between them given to the jury by the plaintiff and defendant, respectively, are conflicting, we must assume that in everything in which such conflict existed the jury gave credence to those statements which are necessary to support their verdict, and disregarded those in contradiction thereof. The appellant has not brought up with the record the instructions given by the court upon the issues before the jury, and we must also assume that the issues to be determined by them were fully and correctly presented and pointed out, and that they were also correctly instructed upon all matters of law arising in the case pertaining to these issues: *Garrison v. McGlockley*, 38 Cal. 78.

1. It is contended by the appellant that, although the instrument of May 24th was only an option, and binding upon Smith alone, yet its acceptance by Buttner on the 29th of May made it a mutual contract, binding upon him as well as upon the appellant; and that, consequently, he has no right of action for its breach until after an offer of performance on his part, and a refusal by the appellant. The evidence, however, fails to show that the option contained in the instrument was ever so accepted by Buttner as to give Smith the right to insist that he should take the stock. The statement of Buttner to Smith, on the 29th of May, that he was ready to take the stock "according to the terms of the writing," was conditioned upon the performance of those terms by Smith, and, if Smith had

then tendered him the stock, he could have enforced the payment by Buttner; but when Smith told him that he was unable to close the transaction because a portion of the stock was held by McCoy, the conditional acceptance of Buttner ceased to have any effect, and did not become operative. The extension by Smith of his agreement until the 9th of June, which he then indorsed upon the original instrument, and gave to Buttner, had the same effect as if that date had been originally inserted in the instrument, and gave to Buttner until that date in which to accept the offer. While the transaction in which Buttner let Smith have the \$3,100 involved in this action had reference to the negotiation for this stock, and may have been induced by the fact that the option had been given, it is shown by the evidence that it was made after this extension of time had been given, and was independent of the transaction. As the offer was never accepted by Buttner so as to become a binding obligation upon him, the appellant could not have been prejudiced by excluding his testimony in reference to any understanding respecting its terms.

2. When the cause was submitted to the jury, the court instructed them to give interest upon the sum of \$3,100 from the date when the action was begun, and also directed the jury to make a special finding of the date at which the plaintiff made demand from the defendant for the return of this money. The jury found that this demand was made in the month of August, 1889, and the plaintiff thereupon moved the court to add to the verdict interest upon said sum of \$3,100 from September 1, 1889, to the date when the action was begun. The court denied this motion, and the plaintiff has appealed therefrom. As the defendant was not entitled to retain the money after the plaintiff's demand therefor, his refusal to comply with such demand made him liable for interest thereon from that date (Civ. Code, sec. 3287); and the judgment should be modified by increasing the same as of the date of its entry in the sum of \$377.26, the interest on \$3,100 from September 1, 1889, to May 27, 1891, the date when the action was commenced. The order denying a new trial is affirmed, and the court below is directed to modify the judgment as above indicated.

We concur: Garoutte, J.; Paterson, J.

NUMSEN et al. v. LEVI et al.

No. 15,342; May 2, 1894.

36 Pac. 657.

Sale Through Brokers—Repudiation by Purchaser.—Where merchandise brokers present to purchasers a memorandum of the sale, or “bought note,” which is accepted by them, the latter cannot repudiate the sale seven days after part of the goods are shipped, and two days after they receive invoices of such shipment, because the sellers did not give a certain guaranty required by the purchasers’ contract with the brokers.

APPEAL from Superior Court, City and County of San Francisco; Eugene R. Garber, Judge.

Action by Numsen and others against Levi and others to recover the contract price of certain oysters sold and delivered by plaintiffs to defendants. From a judgment for plaintiffs, and from an order denying a motion for new trial, defendants appeal. Affirmed.

Wal. J. Tuska for appellants; Pierson & Mitchell for respondents.

PER CURIAM.—In November, 1891, Duval & Co., merchandise brokers at San Francisco, claiming to represent plaintiffs, who were doing business as oyster packers at Baltimore, Maryland, offered for sale to the appellants a lot of canned oysters at a shade off current rates. The offer was accepted upon condition that the packers should execute a written guaranty to appellants that the goods were as good in pack and quality as the goods of Farren & Co. or Fait & Weinbrenner, well-known oyster packers. A written order was given for four hundred and sixty cases of “selects” and six hundred and seventy cases of “standards”; the prices for both lots being fixed at \$2,000. The oysters were to be delivered at Baltimore, in unlabeled cans—the purchasers being allowed the cost of labeling—as follows: “60 cases of selects, made up of 40 cases of 12 oz. and 20 of 6 oz. cans; and 90 cases of standards, made up of 25 cases of 10 oz., 20 of 5 oz., 25 of 8 oz., and 20

of 4 oz., cans''—to be delivered at the cars in Baltimore, and sent to San Francisco by freight, the balance of the order by sailing vessel. Duval & Co. did not communicate with the packers, as they agreed to do, but took the written order given them by the appellants, and, without the knowledge of the latter, wired E. C. Shriner & Co., brokers at Baltimore, as follows: "Levi—selects, 340 12's, 126's; standards, 225 10's, 125's unlabeled; Numsen's labels, 124's 222 8's, \$1.45. Getz—200 selects, 12's unlabeled. Have sent shipping directions. Selects must fully equal best sample. Standards must be as good as the pool. Express us samples of both. Credit us overcharge on all 8's. W. M. Duval & Co." Upon receipt of this dispatch, Shriner filled the order by purchasing from the respondents three hundred and forty-five cases of standards—two hundred and twenty-five cases of the ten ounce, and one hundred and twenty of the five ounce—at the prices agreed upon by appellants and Duval & Co., and by purchasing from other parties the balance of the order, and delivered to the respondents a memorandum in writing (or "sold note," as it is called) for that portion of the order purchased from them. The note reads as follows:

"Baltimore, Nov. 19, 1891.

"Bought of William Numsen & Sons, for account of H. Levi & Co., San Francisco, Cal. (description of the goods), terms 60 days or cash, less one and a half per cent. Hold for shipping directions.

"E. C. SHRINER & CO."

Thereupon Shriner wired to Duval & Co., to the effect that the respondents confirmed the sale to Levi & Co., upon receipt of which Duval & Co. made out a memorandum of sale, called a "bought note," and delivered it to Levi & Co., who have ever since kept it, and have never offered to return it. This bought note is in two parts—the one covering the shipment by rail, and the other by sailing vessel. Copies of this bought note were mailed to Shriner & Co., and received by the former on November 25th; and on the last-named day they wrote to Duval & Co., confirming the sale, but no written guaranty was ever furnished. Duval & Co. had no correspondence with plaintiffs on the subject, and had no instructions from them. On December 2d, in accordance with instructions from Shriner & Co., the respondents delivered the rail shipment at

Baltimore, and forwarded to appellants the invoice by mail; and on December 10th delivered the balance of the goods, and forwarded the invoice by mail. In about a week after the sale the appellants complained to Duval & Co. that the respondents had failed to confirm the terms of the sale in that they had not given the guaranty required by the contract. On December 7th the appellants for the first time disclaimed the sale. At that time the market for standards had gone down. Upon receipt of the invoices the appellants wrote to Duval & Co. that, as they had not received a guaranty from the Baltimore packers as promised, they should decline to receive any goods they might pack for them under the memorandum. Upon receipt of this letter (December 8th) Duval & Co. at once wired Shriner that appellants were trying to repudiate the contract, but nothing of this was known to respondents until December 15th, when they received from the appellants a letter dated at San Francisco, December 9th, saying that they were surprised at the shipment, as they entered into negotiations only with Duval & Co., which were not consummated; that they had not even received any invoice; and that they declined to receive the shipment, and requested respondents to make some arrangement by mail relative to the same. Other correspondence followed, in which the appellants insisted there was not a sale, and refused to pay for the oysters, whereupon this action was brought by respondents to recover the sum of \$1,074.62. Findings and decree were entered in favor of plaintiffs, according to the prayer of their complaint, and from this judgment, and an order denying their motion for a new trial, the appellants have appealed.

Upon the facts stated we think that the judgment was right, and should be affirmed. It is a well-established rule that the broker is the agent for both parties. When the bought note of November 19th was furnished by Duval & Co. and accepted by the appellants, the sale could not thereafter be set aside except by mutual agreement of the vendors and vendees. In procuring the confirmation of the sale by respondents, Duval & Co. acted as their agents, and in delivering the same to the appellants they acted as the agent of the latter within the well-established rule and the custom of brokers. We think the note was a sufficient memorandum of the sale within the provisions of subdivision 4, section 1624, Civil Code. The

mere fact that the name of the vendor did not appear in the bought note did not render the latter void, it being clear that Duval & Co. were acting as brokers for the vendor. The sold note delivered by Shriner & Co. to the respondents contains the names of both the vendor and vendee, and is sufficient, under the custom of the trade, if the names of the contracting parties appear upon either one of the notes. There is no contention, as we understand it, that the oysters were not as good as Farren & Co.'s or Fait & Weinbrenner's. The appellants did not repudiate the sale until the invoices of the first shipment had reached them, five days after the shipment; and the letter of December 9th shows that they waited two days after the receipt of the invoices before they wrote to the respondents repudiating the sale. This was twenty days after they had received the memorandum from Duval & Co., reciting that the goods had been sold to H. Levi & Co., and which gave a description of the goods, and the terms of sale. Under these circumstances we think the respondents are now estopped from denying the validity of the sale. Judgment and order affirmed.

CITY AND COUNTY OF SAN FRANCISCO v. BURR
et al.*

No. 15,326; May 14, 1894.

36 Pac. 771.

Dedication for Street.—Where a Plat of Land is Recorded, and land appears thereon not numbered as a lot, nor corresponding in size or shape to one, but bounded by lines clearly intended to represent the lines of a street, and lots are sold as being bounded on such street, such land is dedicated for a public street, though not named as such on the plat.¹

A Judgment Against Persons Sued by Fictitious Names, where the complaint is never amended, as required by Code of Civil Procedure, section 474, by inserting their true names, will be reversed on appeal.

*For subsequent opinion in bank, see 108 Cal. 460, 41 Pac. 482.

¹ Cited and followed in *Martinez v. City of Dallas*, 102 Tex. 59, 113 S. W. 1167, a memorandum decision.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the city and county of San Francisco against E. W. Burr and others to abate a nuisance consisting of maintaining a fence across a public highway. From a judgment for plaintiff, defendants appeal. Reversed as to defendants sued by fictitious names and as to all others affirmed.

J. C. Bates for appellants; H. T. Creswell for respondent.

DE HAVEN, J.—1. The finding of the court that the land described in the complaint was dedicated as a public street is fully justified by the evidence set out in the bill of exceptions. It appears therefrom that the city of San Francisco was the original owner of said land, as successor of the former pueblo of Yerba Buena, and of the lots adjacent thereto, and that such adjacent lots were sold by it with reference to the map found in "Book B. D. R., Alcalde Grants of 100-Vara Lots in the Laguna Survey," upon which map, as well as upon the subsequent official maps of the city, known as the "Eddy Maps of 1850 and 1851," the land in controversy is sufficiently represented as a public way. It is true it is not named as a street on either of these maps, but, to use the language of the court in *City of Indianapolis v. Kingsbury*, 101 Ind. 209, "its shape, situation, and dimensions," as laid out on each, "show it to be a way of some kind." It is not numbered as a lot, nor does it correspond in form or size to the lots appearing on the maps; and the lines which mark its boundaries, as shown by each map, clearly indicate that they were intended to represent the lines of a street, and certainly, when the adjacent lots were sold by the city as bounded on the street thus represented on the map, the dedication by the city of such land for public use as a street was complete.

2. The defendants Domario, Devignenze, Hatman, Ferro and Martha W. Wood were sued by fictitious names, and duly served in the action, but the complaint was never amended by inserting their true names, as required by section 474 of the Code of Civil Procedure, and all of them, with the exception of Martha W. Wood, made default. The judgment against these defendants cannot be sustained, as there is nothing in the

complaint to show that the plaintiff is entitled to any judgment against them, or that they are the persons guilty of maintaining the nuisance complained of. A judgment against a person whose name is not mentioned in the complaint must, upon appeal therefrom, be reversed as to such person: *McKinlay v. Tuttle*, 42 Cal. 571; *Campbell v. Adams*, 50 Cal. 205; *Baldwin v. Morgan*, 50 Cal. 585; *Farris v. Merritt*, 63 Cal. 118.

The judgment against the defendants Domario, Devignenze, Hatman, Ferro and Martha W. Wood is reversed, and as to all the other defendants the judgment is affirmed.

We concur: McFarland, J.; Fitzgerald, J.

PAINTER et al. v. PAINTER et al.

No. 15,310; May 25, 1894.

36 Pac. 865.

Partnership Accounting.—Upon the Death of One Partner the business was carried on for a number of years by the survivor. In a suit for an accounting and the appointment of a receiver, it appeared that the books contained many errors and erasures. Many of these errors compensated each other. The same method of book-keeping was pursued, and the same irregularities were found, both before and after the deceased partner's death. Many of the more serious irregularities were explained. The books had been kept continuously by the same bookkeeper, who testified that he had never made a fraudulent entry. Held, not to sustain a finding of fraud.

Partnership Accounting.—Where a Surviving Partner has Conducted the business for six years to the advantage of all parties concerned, a decree declaring all the assets to belong to the old firm, and refusing to allow such partner any compensation for his services, or even credit for amounts paid a manager of the business, is erroneous.¹

¹ Cited in the note in 112 Am. St. Rep. 844, on right of surviving partner to compensation.

Cited in *Harrah v. Dyer* (Ind.), 96 N. E. 44, where the court says: "As indicated, the decisions are at variance on this question, the general rule being that in the absence of contract, the surviving partner will not be allowed compensation where the settlement simply involves the sale and collection of the partnership assets and payment

Partnership Accounting.—In a Suit Against a Surviving Partner for an accounting, a credit to him on account of real estate appeared in the ledger, written over an erasure under date of February 28, 1882. An expert witness surmised that the entry was made in 1883, after the death of plaintiff's decedent, and fraudulently antedated, as he saw nothing on the face of the books to justify the entry. Defendant's account-book, kept as one of the books of the firm, contained entries justifying the credit, and the item appeared properly entered in the journal between entries unquestionably made in 1882. Defendant testified, corroborated by vouchers and his account-book, that he took land in his name for the firm; that the payments were made by the firm, though charged to him, and the credit was made by the consent of his partner to balance his account. Held, insufficient to sustain a finding that the entry was fraudulent and void.

Partnership Accounting.—One Partner Advanced Money to the Firm, and permitted his copartner to withdraw it for his individual use. The latter died without having returned the money. Thereafter, an action was brought by his personal representatives against the surviving partner for an accounting. Held, that the claim need not be presented for allowance against the estate of the deceased partner, but would be adjusted by charging plaintiffs therewith on the partnership accounting.

Partnership—Receivership After Death of Partner.—The control of firm assets and business should not be wrested from the surviving partner, by the appointment of a receiver, without a clear showing of mismanagement or improper conduct, and of danger of ultimate loss to the estate of the deceased partner.

APPEAL from Superior Court, City and County of San Francisco; F. W. Lawlor, Judge.

Action by Caroline A. Painter and E. B. Dallah, executors of the will of Jerome B. Painter, deceased, against Theodore P. Painter and J. Milton Painter, for an accounting. From

of the liabilities; but where the services are in excess of a mere winding up of partnership affairs, a different rule applies."

Cited and followed in *Rowell v. Rowell*, 122 Wis. 15, 99 N. W. 477, the court saying, "The next general proposition on which the judgment rests is that, since the partnership assets were in legal effect not sold to the new concern, but nevertheless were appropriated and used by it in operating its business, they must be deemed to have entered into that business as capital, and that any profits earned are to be attributed to such assets according to their value, to the same extent as to the money capital contributed by John S. Rowell (the surviving partner)."

a judgment for plaintiffs and an order denying a new trial defendants appeal. Reversed.

Pringle, Hayne & Boyd for appellants; Fox, Kellogg & King (P. T. Riley of counsel) for respondents.

VANCLIEF, C.—This is an action by the executors of the will of Jerome B. Painter, deceased, to compel an accounting and settlement of the affairs of the partnership firm of Painter & Co., of which the deceased was a member and Theodore P. Painter was the surviving partner.

The business of the partnership was that of manufacturing and selling printing-presses, type and other materials, and the publication of an annual directory, and other incidental business. The partnership was originally formed in 1859, when it was composed of the three brothers—Jerome B., J. Milton, and Theodore P. Painter, of whom Jerome B., the deceased, was the eldest and Theodore P. the youngest. J. Milton ceased to be a member of the firm October 1, 1865, from which date until the death of Jerome, February 6, 1883, the eldest and youngest brothers continued to be equal partners. During the partnership the firm acquired considerable real estate, a portion of which stood in the joint names of the partners and a portion in the separate name of each partner. By the will of Jerome B. all his share in the partnership stock and goodwill of the business, except the real estate, was devised to his brothers, J. Milton and Theodore P., upon the condition of their assuming the partnership liabilities. Shortly after the death of Jerome, Theodore, the surviving partner, formed a new copartnership for the same purposes with J. Milton, without changing the firm name; and on December 3, 1884, they filed a certificate of their partnership, under the firm name of Painter & Co., as having existed since February 12, 1883. Before entering upon the business of the new firm, they took an account and inventory of the stock on hand, which was reported to the appraisers of the estate of Jerome B. Painter. All stock on hand was then marked so as to distinguish it from any additional stock they might acquire, and all sales of that stock were thereafter distinguished on the sales-books from the sales of other stock. The books of original entry, cash-book and journal used by the old firm were used by the

new firm, and were kept by the same bookkeeper, George W. Darbey, who had kept the books of the old firm for more than six years prior to the death of Jerome B. Painter. By order of J. Milton, posting of the old firm books was discontinued until it was discovered that they had not been fully posted prior to the death of Jerome, when directions were given to complete the posting of them. No posting of the accounts of the new firm nor of sales of the stock of the old firm was done for a period of about four years; but proper data for future posting were kept in the books of original entry, cash-book and journal. Only one cash account was kept, but the sales-book clearly distinguished the sales of the old stock from the sales of new. J. Milton was the manager of the business, but made no charge against the old firm for his services or for services of the new firm for selling the old stock, nor for collecting the debts due the old firm. The continuance of the business by the new firm facilitated, to some extent, the winding up of the old business. New machinery was purchased by the new firm for the manufacturing department; and the manufacture and sale of new stock, and the continuance of a general sale department, helped the gradual disposition of the old stock at less expense and sacrifice than probably would have been incurred by putting it upon the market at once, and separately from a general business and assortment of goods in that line. In 1878 the old firm entered into an agreement with Francis & Valentine, H. E. Langley, and others for the purpose of the copyrights and privileges of "Langley's San Francisco Directory," and certain other directories, and of the goodwill of the business of publishing the same, and agreed to publish the same annually for a period of ten years, and to pay to Francis & Valentine twenty per cent of the value of all copies sold—equivalent to a royalty of one dollar per volume—and providing that "in case of the death of either of the partners composing the firm, as it then existed, the surviving partner and the estate of such deceased partner shall have the right of abandoning the publication of the aforementioned works," and of being discharged from future liability, upon reassignment of the copyright and goodwill of the business. Up to the death of Jerome B., February 6, 1883, the publication of the directories had been made at a continual loss to the firm, and the publication for the year

1883 caused a loss of \$1,200. The surviving partner, Theodore P., who was also one of the executors of the will of Jerome B., proposed to abandon the business of publishing the directories, as unprofitable, and spoke of the matter to Mr. Dallam, a coexecutor, who interposed no objection; but J. Milton Painter was of opinion that the future publication of the San Francisco directory might be made profitable, if they could secure more favorable terms from Francis & Valentine; and it was concluded to make another attempt, on the condition that the new firm should act on their own responsibility, and at their own expense. As a result of the efforts of J. Milton Painter, the contract with Francis & Valentine was modified so as to reduce their royalty on the San Francisco directory to fifty cents per volume. J. Milton then introduced a change of management, by which the publication of that directory became profitable. In November, 1886, the contract was further modified so as to constitute a partnership between the new firm of Painter & Co. and the firm of Francis & Valentine, for the publication of the San Francisco directory on the basis of sharing equally the profits and losses, but the publication was to be under the supervision of Painter & Co. After the year 1883 the plant of type, stands and cases used by the old firm of Painter & Co. was used by the new firm in the publication of the directory, without formal transfer to the new firm; but all money required to be advanced for the publication for each year thereafter was advanced by the new firm, and a yearly rental of \$300 was allowed as compensation for the use of the plant. The accounts of the directory concern were kept upon the books of the old firm by the same bookkeeper, without change in the manner of keeping them. The only means of discriminating between the old and new accounts consisted of the dates of the entries, and the essential nature of the business of publishing a new directory for each succeeding year. All accounts in regard to the directory, pertaining to the business of the old and new firms were entered continuously upon the same books, in the same firm name, of Painter & Co.

In the year 1884 litigation arose between the surviving partner of the old firm and the estate of Jerome B. Painter, deceased, growing out of an attempt of the surviving partner to enforce a debit to the account of Jerome B. as a claim

against his estate, though his net interest in the firm assets had been appraised at \$4,152.94. This attempt of the surviving partner was defeated by a decision of this court in January, 1886: 68 Cal. 395, 9 Pac. 450. In May, 1888, the surviving partner, having resigned his position as executor, brought suit to settle the old partnership and to sell the real and personal assets of that firm; and, in October of that year, J. Milton Painter brought suit to obtain a construction of the will of Jerome B. Painter, and to marshal the assets of the firm and of the estate of the deceased partner. In May, 1889, the present suit was brought, the complaint in which charges, in substance, that upon the death of Jerome B. Painter, the surviving partner, Theodore P. Painter, took possession of all the property and business of the firm, and admitted the defendant J. Milton to an interest in the business; that defendants have ever since conducted the business as if it had been their own; that Theodore P. was both surviving partner of the old firm and one of the executors of the will of the deceased partner; that he has neglected and refused to settle the affairs of the partnership; that, by order of the probate court, he has filed a report and account in that court, wherein he falsely claimed that at the time of the death of Jerome B. he was indebted to the firm in the sum of \$44,000 and upward, which indebtedness, on September 10, 1888, had increased to \$73,000, whereas, on the contrary, the partnership was indebted to him, at the time of his death, in the sum of \$50,000 at least; that the said report and account filed were insufficient and unintelligible, as well as false and fraudulent; that the probate court appointed an expert to examine the books, and state an account of the condition of the affairs of the partnership, who has been engaged in that work for several months, but is unable to state the account, for the reason that defendants have not, for many years past, kept any true or intelligible account of the business of the partnership; that, since the death of Jerome B., Theodore P. has altered and falsified the accounts of both himself and Jerome B., and made many new, false and fraudulent entries in the books, with intent to cheat and defraud the estate of Jerome B.; that he has collected large sums of money on account of the firm, amounting to at least \$20,000, which he has not accounted for, but has appropriated to his own use; that he has so managed the

business as to lose, in a large degree, the goodwill of the business; that the books have not been posted since April, 1885; that false and fraudulent balances have been carried forward in the cash-book, showing the balance of cash on hand to be far below what it really was; that there would be due to the firm about May 16, 1889, the sum of \$16,000, on account of the printing of the San Francisco directory, which money is and will be the property of the firm, and would be lost to the firm if paid to the defendants; that the estate of Jerome B. Painter cannot be closed without a settlement of the partnership; and that unless all the books, papers, vouchers, properties and assets of the firm are taken from the hands of the defendants, into the custody and control of the court, there is imminent danger that the interest of the estate of Jerome B. Painter in the property of the firm will be entirely lost. The prayer of the complaint is for the appointment of a receiver, and for an accounting and settlement of the partnership. The answer denies each allegation of fraud, and all danger of loss to the estate of Jerome B. Painter. It claims that the money received, and to be received, from the publication of the directory is no part of the assets of the firm of which Jerome B. Painter was a member. It avers that the keeping of the books was intrusted wholly to George W. Darbey, the same bookkeeper who was originally employed by Jerome B. Painter, and they were kept in the same style and manner after as before his death; that no false or fraudulent entries were made in the books at any time, and no irregularity appears on the books, since the death of Jerome B. Painter, which has not a precedent and example in the books as previously kept by Darbey; that the omission of posting in the ledger was through a misunderstanding on his part of instructions given him. It sets forth the efforts made by the surviving partner to liquidate the business of the firm of which Jerome B. Painter, deceased, was a member, and the pendency of the action brought by the surviving partner, May 4, 1888, to settle the partnership. The court appointed a receiver, who took possession of the whole of the type-foundry business, merchandise, and personal property on hand, of every description, and the whole of the directory business, and moneys arising therefrom, to the exclusion of both of the defendants. The findings were in favor of the plaintiffs upon every issue, in-

cluding all of the averments of fraud; and, as the result of an accounting of the whole business from 1880, the court adjudged that Theodore P. Painter was indebted to the firm of Painter & Co. in the sum of \$28,675.64, one-half of which was declared a lien, in favor of the estate of Jerome B. Painter, upon Theodore P. Painter's half of the assets of the firm, and further adjudged that the defendant J. Milton Painter had no interest in any of the assets of the firm, including the property in the hands of the receiver, all of which was adjudged to be firm assets. The defendants moved for a new trial, alleging the insufficiency of the evidence to sustain the findings of the court; and this appeal is from the judgment, and from an order denying their motion for a new trial.

1. The evidence is insufficient to sustain the findings in regard to the alleged fraud of the defendants. Those findings are based upon the surmises of Mr. Folger, an expert witness, that various irregularities and erasures found in the books, and certain entries, of which the explanation was not obvious upon inspection, were indicative of fraud. These surmises were natural, as appears from the testimony of Mr. Van Bokkelen, another expert witness, who states "that while, on the preliminary examination of the books of Painter & Co., the irregularities found by him made a very unfavorable impression, yet on a more careful examination of such irregularities and errors, and the discovery of the explanation of the more serious of them, and the examination of the methods of bookkeeping for several years prior to the death of said Jerome, in which the same irregularities and errors occur, he is now satisfied that those errors and irregularities, with attending circumstances, exclude the idea of fraud." If the record did not afford the means of testing the relative value of the opinions of Mr. Folger and Mr. Van Bokkelen, the case might be considered as one of conflicting evidence; but from the facts, figures, and circumstances found in the record, all supporting Mr. Van Bokkelen's theory, I think Mr. Folger's unsupported opinion does not create a substantial conflict, and is too slight and uncertain to justify a finding of fraud: Code Civ. Proc., sec. 1835; Estate of Carpenter, 94 Cal. 411-419, 29 Pac. 1101; People v. Stewart, 80 Cal. 131, 22 Pac. 124. The evidence discloses a careless habit of bookkeeping by Darbey, and it is somewhat surprising that his services were

retained, not only during the last six years of the life of Jerome B. Painter, and by the new firm of Painter & Co. until the appointment of the receiver, in 1889, but also by the receiver himself, from the date of his appointment to the time of the trial, in 1892, notwithstanding the fact that the affidavit on which the receiver was appointed disclosed the principal irregularities appearing in the books kept by Darbey. The evidence shows, and it is not disputed, that Darbey kept the books in the same careless and bungling manner from the beginning to the end of his services to the two firms of Painter & Co., but does not sufficiently show that either he or any of his employers were at any time guilty of fraud, or that any fraudulent entries were made in the books, or that any entries were fraudulently omitted, though the books contain many mistakes and erasures, and the vouchers show that entries were carelessly omitted. It appears that during the lifetime of Jerome B. Painter he was the managing member of the firm. He had kept the books for a time, and always had more immediate supervision of the books and accounts than had Theodore, who was a printer, and had never studied bookkeeping, either practically or theoretically, and seldom examined the books, further than to see that certain entries were made in which he had an interest. After the death of Jerome B. Painter, no entry appears to have been made in any book by Theodore P. Painter or J. Milton Painter; but all entries were made in the handwriting of Darbey, who testifies that he never made a fraudulent entry in the books. Yet the evidence establishes that during the lifetime of Jerome B. Painter, as well as subsequent to his death, there were many irregularities, consisting of mistaken entries made on the wrong side of the accounts, with many erasures and corrections of mistakes in the cash account, and careless omission of entries and postings. The books abound with so many of these errors throughout the service of Darbey as bookkeeper, many of which compensate each other, that it cannot be supposed that they were fraudulently designed. None of them, when viewed in the light of all the circumstances in proof, is inconsistent with innocent design, and it follows that none of them should be considered as fraudulently designed. Fraud should never be presumed, nor grounded upon mere suspicion, nor inferred from circumstances which are susceptible

of an explanation consistent with innocent intention: *Estate of Carpenter*, 94 Cal. 411, 412, 29 Pac. 1101; *Estate of Kidder*, 66 Cal. 490, 6 Pac. 326; *United States v. Arredondo*, 6 Pet. (U. S.) 716, 8 L. Ed. 557; *Tucker v. Moreland*, 10 Pet. (U. S.) 78, 9 L. Ed. 345; *Paxton v. Boyce*, 1 Tex. 317-325; *Steele v. Kinkle*, 3 Ala. 358.

2. The court erred in finding and adjudging that the whole of the assets taken from the possession of the defendants by the receiver were the assets of the old firm of Painter & Co., and at the same time refusing to allow any compensation to either of the defendants for their labor, skill and energy in the conduct of the business for six years, and charging Theodore P. Painter with all the funds drawn by J. Milton Painter for his support during that period, while acting as manager of the new firm. He drew funds for his support at the rate of about \$116 per month, aggregating during the six years the sum of \$8,372.54, all of which Theodore P. Painter is made to pay out of his own pocket, without deduction or allowance of any compensation for the services of J. Milton Painter. J. Milton Painter was treated by the court, in all respects, as a mere intruder in the business of the old firm of Painter & Co., and as if he were a mere private employee of Theodore P. Painter, payment for whose services could not be charged to the old firm by the surviving partner. Such a ruling is manifestly unjust, and contravenes the principles of equity. It is true that a surviving partner is not entitled to compensation for the mere winding up of the business of the firm. "But the rule applies merely to the simple and immediate winding up, by collecting the assets, paying the debts, and accounting for the surplus, as is necessarily involved in the creation of a partnership, and implied in the contract; but for time, skill and trouble expended beyond this, and inuring to the general benefit, the reason of the rule fails, as where, after dissolution, a partner successfully continues the business of the firm, using the original capital, goodwill, or other assets, and a benefit is received from his efforts, he is allowed to deduct from the profits a compensation, varying according to the state of the accounts, the nature of the business, the difficulty and results of the undertaking, and, perhaps, its necessity or desirability. The most usual application of the limitation of this principle is in the case of a surviving partner

continuing the firm business or completing the enterprise of the partners": 2 Bates on Partnership, sec. 773. This court has said: "When the partnership has been carried on for some time after a dissolution by death, and such continuance has proved beneficial to the parties, it is but just and proper that the surviving partner should receive a reasonable allowance for his skill and industry in conducting the business; for during that time the business has not received the care and labor of the deceased partner, as an equivalent for such services. While all the parties are living, each is under obligation to devote his time and services to the partnership business, and there is therefore good reason for holding that neither should receive a compensation for such services. But when, in consequence of the death of one partner, this equality no longer exists, it is but equitable that the surviving partner should be compensated for such services as he may have rendered in the business after the death of the deceased partner, to be deducted out of the profits realized by the continuance of the business, and the overplus of such profits, after deducting such compensation, to be divided between the partners: Story on Partnership, sec. 343, and notes; Collier on Partnership, sec. 328; Gow on Partnership, 354. We do not wish to be understood, however, as holding that the surviving partner is entitled to compensation merely for services rendered in winding up the affairs of the firm (*Beatty v. Wray*, 19 Pa. 516), but to confine it to a case like the present, where the partnership business has been continued for a considerable period in order that the affairs of the partnership may be advantageously wound up": *Griggs v. Clark*, 23 Cal. 427, 430. Where a surviving partner, who has continued the business to advantage, is ordered to account, he should be allowed all expenses incurred in continuing the business: *O'Reilly v. Brady*, 28 Ala. 530; *Calvert v. Miller*, 94 N. C. 600. And in the present case, upon the theory that the whole business conducted by the defendants should be regarded as if continued by the surviving partner for the benefit of the old firm, a reasonable compensation for the services of J. Milton Painter, as manager of the continued business, should be allowed as an expense incurred in continuing the business, in addition to a reasonable compensation for the services of the surviving partner. Where a partner forms a subpartnership with a

third person, who becomes manager of the firm business, such manager not being a partner of the other partner, is entitled to compensation, as against him: *Newland v. Tate*, 3 Fred. Eq. (N. C.) 226. But it is by no means clear that the court was justified in ordering an accounting of the whole of the business conducted by the new firm of Painter & Co., and in taking into its custody all of the assets claimed by that firm. It is true that, as a general rule, an accounting of profits will be ordered against a surviving partner who conducts the business after dissolution, with the use of the firm assets. "But if, from the nature of the concern, and the state of the accounts, the assets cannot be realized, except by continuing business, and the surviving partners continue as a new firm, debiting themselves with old assets, they are not accountable for profits": 2 *Bates on Partnership*, sec. 794. "Just allowances to the continuing partners are always made, and if the main contribution to subsequent success is the skill, time and diligence of each partner, it is difficult or impossible to say how much of the profits is to be allowed for or deducted for the services of incoming new partners; and, if an accountability for profits would be unjust, the court may allow interest only": *Id.*, sec. 797. The rule for an accounting of profits "being founded on the misuse of another's property, held for other purposes only, and on its exposure to risks, the share of profits to be accounted for is measured by the amount attributable to that source. Hence, if the subsequent profits are partly or wholly due to the skill of the remaining partners, a special inquiry is necessary to ascertain the amount. No general rule can be made": *Id.*, sec. 797. There should be no accounting for subsequent profits where the deceased partner owes the firm more than the amount of his interest in the business of the firm, and the subsequent profits arise from the prudence, skill and industry of the remaining partners: *Id.*, sec. 798, and cases cited.

The case at bar seems to be a proper one for a special inquiry. According to the theory of the evidence contended for by the appellants, viz., that Jerome B. Painter bought all of the school lands purchased by him on his own private account, as his property, and that they are not assets of the partnership, and that Theodore P. Painter is entitled to all the credits of which he has been deprived by the findings and decree

of the court, Jerome B. Painter might prove to be indebted to the firm, at the time of his death, beyond the actual value of his interest in the personal assets of the firm at that date, the actual value of which does not now certainly appear. If that theory were sustained, as the result of a new trial, his estate would not be entitled to share at all in the profits of the business conducted by the new firm. But, in determining the assets of the firm at the date of his death, the value of the goodwill of the business must be taken into the account; and it should be ascertained by special inquiry what was the precise value of the interest of Jerome B. Painter in the personal assets of the firm, including the goodwill, at the date of his death, and to what extent his interest in the assets was employed by the new firm in the conduct of their business. To the proportionate extent to which his interest in the goodwill and personal assets of the old firm was actually used by the firm in the prosecution of its business, his estate ought, in equity, to participate in the profits realized by the new firm. On the other hand, to the full extent of the interest of Theodore P. Painter in the assets of the old firm, as a partner therein, and of all moneys advanced by the members of the new firm, either individually or upon their joint credit, and to the extent of their purchase of new machinery and new merchandise with their own funds, and to the extent of the value of their personal services, skill and energy employed in the business of the new firm, it is equitable and just that the new firm should receive its proportionate share of the profits realized from the new business. In estimating the value of the goodwill of the old firm, it should be considered that, while the old firm had the right to continue the publication of the directory, it was not under contract obligation to do so after the death of Jerome B. Painter, and that the original contract, as made by the old firm, had proved unprofitable, and that the profits subsequently realized were owing to modification of the contract secured by J. Milton Painter, and largely owing to his management of the business. It should also be considered, as matter of law, that no directory to be published after the death of Jerome B. Painter could have been copyrighted in advance of its publication, so that such copyrights could not be the property of the old firm. The question to be determined in this connection is merely as to

what was the actual value of the goodwill of the directory business, considered as a part of the goodwill of the whole of the firm business, when the new business was inaugurated by the new partners under the old firm name.

3. The evidence is insufficient to justify the finding that the entry of a credit to Theodore P. Painter on the books of the old firm, of the sum of \$15,203.19, on account of real estate and interest, was fraudulent and void, and that that amount was properly chargeable against him. The entry is written in the ledger over an erasure at the top of a column under date of February 28, 1882, and the expert witness, Mr. Folger, surmised that the entry was made February 28, 1883, after the death of Jerome B. Painter, and was fraudulently antedated; and, as he saw nothing on the face of the books to justify the entry, he thought that that amount should be charged back to Theodore P. Painter. But he admits that he did not examine the private account-book of Theodore P. Painter, which was kept in the handwriting of Darbey, as one of the books of the firm, which, as the expert witness Van Bokkelen clearly shows, contained entries of sundry amounts paid by him on account of real estate and interest, which correspond with and justify the entry of \$15,203.19 made to his credit in 1882. The narrative of Theodore P. Painter, which is corroborated by his account-book and the vouchers produced in evidence, is to the effect that B. C. Vandall was indebted to the firm of Painter & Co. in a large sum of money, and having no assets other than heavily encumbered real property at South San Francisco, which might have a prospective value, but then had no value beyond the amount of the encumbrances thereon, proposed to transfer it to the firm, subject to the encumbrances. Jerome Painter endeavored to have the title taken in the name of a third person, as he did not wish to have Vandall ask the firm for more money in case the land should rise in value, but, failing to secure such third person, requested Theodore P. Painter to take the deed of the land in his name. The property thus standing in the name of Theodore, the payments from the firm money made by him to pay off the encumbrances were entered by the bookkeeper upon Theodore's cash account; and the entry of \$15,203.19 to his credit upon the journal and ledger in 1882 was of an amount then calculated by the bookkeeper to correspond with the prin-

incipal and interest with which Theodore had been charged, and was entered upon the books at Theodore's request, in accordance with a tag showing the amount calculated by the bookkeeper, which he obtained from Jerome B. Painter. The entry upon the journal is without erasure, under a page bearing date March 31, 1882, but following an entry carried over from the previous page under date of February 28, 1882; it being the custom of the bookkeeper to make his journal entries as of the last day of each month. Immediately following the journal entry of this credit is a debit to the Boston & Fairhaven Iron Company, which the press copy of letters shows must have been entered in March, 1882, and was correctly posted as an entry of March 31, 1882. The credit of T. P. Painter was posted in the ledger under date of February 28, 1882. The amount of interest entered in the journal as part of the credit was calculated by Darbey only to February 1, 1882. The erasure over which the posting was made in the ledger is fully accounted for by a previous mistaken entry of a debit balance of December 31, 1880, which was commenced to be carried to the wrong side of the page, and erased by the bookkeeper, as was his custom in cases of such mistakes, which were comparatively frequent. One of the expert witnesses testified that he had discovered that the word "balance" had been originally written under the entry of this credit in the ledger, and erased; and in the photographic copy of the ledger page, appearing in the transcript, the top of what might be the letters "B" and "I" are plainly visible, and it is apparent that the date of 1880, originally written above the mistaken entry of the debit balance, was changed to 1882—the date of the posting of the credit. The testimony clearly establishes that it was a common mistake of the bookkeeper to commence to place an entry at the beginning of a column of figures in the wrong column, and to correct it by an erasure, sometimes making the correction before he had finished the incorrect entry. Such mistakes and erasures abound in the ledger, but it is noticeable that no erasures of importance appear in the journal, or in the books of original entry; and none appear in the journal entry of this credit, which stands properly between entries which were unmistakably made in 1882—prior to the death of Jerome B. Painter. It is not necessary to review in detail all of the evidence bearing upon

the subject matter of this credit. It has been carefully considered, and it is sufficient to say that, taken as a whole, in view of the well-settled presumption against fraud, it does not sustain the finding that this credit was fraudulent, but does tend to establish, on the contrary, that it was made in the lifetime of Jerome B. Painter, with his knowledge and consent, and was made on account of real estate belonging to the firm. If so, it was improperly charged back against Theodore P. Painter in the accounting between him and the estate of Jerome B. Painter.

4. The same is true of a credit to Theodore P. Painter of \$4,282.98 on account of stock of the South San Francisco Dock Company, entered under date of June 30, 1882. The journal entry of that date appears to be regular, and refers by names and numbers to the certificates of stock for which the credit was given, and is immediately followed by another journal entry of the same date, of interest due the Bank of British North America for the month of June, 1882. No erasure appears in the posting of this entry. This stock was obtained from B. C. Vandall on account of a debt to the firm, and was redeemed and held in the name of Theodore P. Painter for the firm, in the same manner as the land deeded by Vandall to him. Theodore P. Painter testified that this entry was also made, with the consent and knowledge of Jerome B. Painter, at the date of the entry appearing on the books, and there is no proof to the contrary. Before making the entry, Darbey made a calculation of the principal and interest to June 19, 1882, but made a mistake against Theodore P. Painter of \$1,000 in the calculation, thus attaining the precise sum entered upon the books to his credit. Under this state of the evidence, this credit was improperly rejected by the court, and the amount improperly charged back to Theodore P. Painter in the accounting.

5. The court also improperly rejected a credit to Theodore P. Painter of \$1,961.87, entered on the journal March 31, 1882, and posted as of that date, on account of money advanced to F. P. Thompson, and interest thereon, in consideration of the note of F. P. Thompson, executed to the firm of Painter & Co. on the 29th of January, 1878, payable March 1, 1878. This note was drawn in the handwriting of Jerome B. Painter. Theodore P. Painter testified that F. P. Thompson was super-

intendent of state printing, and requested a loan from Painter & Co., and that Jerome B. Painter agreed to the loan, but did not want it to appear upon the books of the company, and requested him to draw the money in several sums, on his private account, and loan it to Mr. Thompson upon his note payable to the firm. The note was not paid, and was about to outlaw in March, 1882, when the amount advanced, with interest, was credited to Theodore, with the knowledge and consent of Jerome. There is nothing to contradict this explanation of the matter. The account-book of Theodore P. Painter, kept by Darbey, shows that in January, 1878, unusually large sums of money, amounting to more than enough to cover the amount of the loan from the firm to Thompson, were charged to Theodore P. Painter, as having been drawn by him from the funds of the firm. Darbey's recollection is that the note was about to outlaw when this credit to Theodore was entered, which would correspond to the date of the credit in March, 1882. It appears that, for some unexplained reason, interest on the money advanced by Theodore P. Painter was calculated to the 18th of April, 1882; but such a calculation would evidently not have been made if the entry were antedated after the death of Jerome B. Painter, in 1883. That it was not so antedated further appears from the journal entry immediately following the credit of \$1,961.87, which is proved by the invoice-book to have been entered in March, 1882.

6. Theodore P. Painter is also improperly charged with \$7,312.48, being the whole of the credit side of a branch account kept by him upon the books of Painter & Co., entitled "Mrs. M. B. Account." "Mrs. M. B." was the mother of the Painters, and Theodore used her initials, in her lifetime, to designate an account of moneys received by him from her as a gift, and also moneys received by him from other friends, which he advanced to the partnership. This account was in fact a separate branch of the account of T. P. Painter with the firm of Painter & Co. But it is evident that, if the items of this account had been entered upon the account kept in the name of Theodore P. Painter, the credit side of the Mrs. M. B. account would have appeared upon the credit side of his own account. No justification is apparent for debiting Theodore P. Painter, individually, with the whole of the credit side of this account. If it were shown that there were any

improper items of credit in the account, they should, of course, be deducted therefrom. So, also, any improper items of debit should be corrected. But Theodore P. Painter should be credited, instead of charged, with any true balance of credit to the Mrs. M. B. account. The balance of credit appearing upon the face of the account is \$6,508.15. Items of credit amounting to \$2,477.33, consisting of \$2,000, principal, received by Jerome B. Painter from Theodore P. Painter March 5, 1881, and interest on that amount, in the sum of \$477.33, from that date until February 28, 1883—the date of the entry of these items of credits—are controverted, as having been improperly entered after the death of Jerome B. Painter, without any corresponding money appearing upon the books to have been paid into the account, or to have been received by Jerome B. Painter. Theodore P. Painter testifies in regard to this entry that just before the first Monday in March, 1881, at Jerome B. Painter's request, he withdrew from the bank \$2,320 of the money due to this account. This amount appears on the face of the account to have been charged to the Mrs. M. B. account, March 5, 1881, as drawn by T. P. Painter individually; and the remaining \$2,000 was deposited in the office of the firm, and was used by Jerome B. Painter personally, under a promise to replace it. He put off adjusting the matter, but finally promised to pay the money on the 20th of February, 1883, but died on the sixth day of that month, without having done so. After his death, Theodore P. Painter, by the advice of his attorney, Judge Cope, had the entry in question made upon the books to the credit of the M. B. account, under date of February 28, 1883. The claim for the adjustment of this matter appears to have been made in good faith, and to have been immediately announced to his coexecutors, who agreed that that sum should be paid. It also appears that in the months of March and April, 1881, the cash account of Jerome B. Painter showed few and small charges to him, indicating that he then had some other source of supply of funds. Under these circumstances, it would seem that the entry of the credit to the Mrs. M. B. account was justifiable, and should not be charged back to Theodore P. Painter. But the entry made by the bookkeeper was an incomplete adjustment of the matter, for the manifest reason that Jerome B. Painter, having actually received the money drawn from this account, which was

deposited in the office of the firm by Theodore P. Painter at his request, should also be charged therewith. The credit to the Mrs. M. B. account appears, in itself, a proper manner of canceling the debit made to that account on March 5, 1881, when the money was merely drawn by Theodore P. Painter from the bank at the request of Jerome B. Painter, and deposited in the office of the firm. It must be regarded, therefore, as remaining in the custody of the firm until taken therefrom by Jerome B. Painter, whose account ought to be charged therewith, as an asset of the firm, instead of the account of Theodore P. Painter, while the firm liability would still remain to return the money to Theodore P. Painter through the Mrs. M. B. account. For these reasons the credit to that account should stand, and the account of Jerome B. Painter should be charged correspondingly. The same result would have been reached by the payment of the money and interest out of Jerome B. Painter's estate to Theodore P. Painter individually; but that estate is in court, and as the matter can properly be adjusted through the medium of the partnership accounting, I think it should be adjusted in the manner indicated. A surviving partner is not required to present a claim against the estate of a deceased partner, who has received money from the custody of the firm, or which constitutes, legally or equitably, a part of its assets, if the claim can be worked out through the settlement of the partnership: *Manuel v. Escolle*, 65 Cal. 110, 3 Pac. 411; *Painter v. Painter*, 68 Cal. 395, 9 Pac. 450. The mere fact that the entry of the credit to the Mrs. M. B. account was made upon the firm books after the death of Jerome B. Painter is not material, there being sufficient proof aliunde to justify the credit. The respondents have not contradicted the sworn statement of Theodore P. Painter as to the claim made by him to them immediately after the death of Jerome B. Painter in reference to the \$2,000 received by Jerome B. Painter in March, 1881, and as to their agreement that it should be adjusted. That Jerome B. Painter had full confidence in the integrity of his brother Theodore is manifest from the terms of the will.

7. A charge of \$349.52 is improperly made against Theodore P. Painter on account of payments made by him upon a firm note for \$700, executed October 1, 1880, to Grace Meininger, payable one year after date, with interest at ten per

cent per annum, payable quarterly. It appears that the money loaned by her to the firm, for which this note was given, was entered upon the books of the firm as an account in her name. But on February 28, 1881, the money was drawn out, and divided between the partners, and the account closed, though the note was not taken up or paid. The payments subsequently made on the note by Theodore P. Painter were charged to him, individually, in the accounting, on account of the apparent squaring of her account upon the books. But the note remained unpaid, and was a subsisting obligation of the firm. It is clear that all payments made by Theodore P. Painter upon the Grace Meininger note, out of firm funds, during the existence of the note, as a firm obligation, are properly chargeable to the firm, and not to Theodore P. Painter individually.

8. Sundry credit items, appearing on the books as credited to Theodore P. Painter, amounting in the aggregate to \$5,988.75 in May, 1889, have been erroneously charged to him by the court in the accounting. These credits were matters of offset to charges made by the bookkeeper to Theodore P. Painter of cash received from sales of merchandise, or from collections reported by him, which appear from the books to have been credited back to him when the money was paid in; and to charge them back to him again is manifestly unjust. These credit items, furthermore, relate largely, if not entirely, to the business of the new firm, and, in so far as they do so relate, their justice is matter of inquiry and adjustment between Theodore P. Painter and J. Milton Painter, as partners. There is no proof that Darbey, the bookkeeper, fraudulently entered these credits to the account of Theodore P. Painter, and there is proof that he had charged Theodore P. Painter, individually, with a corresponding amount of cash received, to which the credits apply when the cash was returned, and paid over by him to the firm.

9. On the face of the cash-book by Darbey, as bookkeeper, a total cash shortage of \$17,432 appears to have occurred between June, 1881, and May, 1889, one-half of which (\$8,656) has been charged to Theodore P. Painter in the accounting. A much larger amount of cash shortage appears on the face of the cash-books to have occurred under former bookkeepers in the lifetime of Jerome B. Painter, between 1871 and 1881.

The cash-books do not appear ever to have been kept in balance. The partners appear to have contented themselves with watching the actual cash receipts and disbursements, and seeing that proper entries were made upon their individual accounts and the accounts of the firm with third parties, without requiring the general cash account to be kept in accurate balance, or to correspond in balance with the balance of cash on hand. The proof is clear, from the examinations of many vouchers, that very many items of cash were not entered at all upon the general cash account. A sufficient number of these omissions were proved to reduce the apparent cash shortage by the amount of \$5,722.69, and to make it evident that the apparent cash shortage was owing to a careless and slipshod manner of bookkeeping, especially as to entries upon the general cash account, which was never balanced, and not owing to any fraud, either on the part of the bookkeeper or of the members of the new firm, in their relation to each other, or in their relation to the old firm of Painter & Co. All entries made upon the books were made by the bookkeeper, Darbey, who was generally careless, and especially so in his posting of the general cash account, which was never balanced, or used by the partners, either of the old or new firm, as a criterion of the amount of cash which ought to be on hand. But Darbey is not convicted of dishonesty, and the manner in which he kept the general cash account goes far to acquit him of such a charge. Had he been dishonest, it is highly improbable that he would have kept that account in a condition to disclose a large cash shortage, for which the firm might call him to account. Indeed, it does not appear that Darbey ever handled any of the moneys of the firm, and it seems absurd to account for the cash shortage upon the supposition of his intentional dishonesty. Neither is there ground, from the evidence, for reasonable belief that either of the partners fraudulently directed the bookkeeper to make false entries in the general cash account, or to omit the making of other entries therein, so as to show, upon the face of the books, a cash shortage of many thousands of dollars. The court has erroneously credited Jerome B. Painter with one-half of the cash shortage of the old firm, which occurred under the administration of Darbey, as bookkeeper, during his lifetime. The evidence discloses that Jerome B. Painter was then the managing partner,

and carefully supervised the accounts of the firm, and controlled its receipts and expenditures, while Theodore P. Painter, the younger partner, was unacquainted with bookkeeping, and had nothing to do therewith, except to see that some entries were made, affecting his interest, under the supervision and with the consent of Jerome B. Painter. Clearly, if any account were to be made of cash shortage occurring under the management of Jerome B. Painter, the whole should be charged to him, instead of crediting him with one-half thereof. But, in view of the presumption against fraud on his part, the proper conclusion is that all apparent shortage in the cash account during his lifetime should be disregarded, and not treated as assets of the firm. The same bookkeeper was employed both by the old and new firm, and, for his loose habits and negligence, Jerome B. Painter was at least in pari delicto with his younger brothers, who were less experienced in bookkeeping, and less familiar with Darbey's methods: *Hottel v. Mason*, 16 Colo. 43, 26 Pac. 335; *Barrett v. Kling* (City Ct. Brook.) 16 N. Y. Supp. 92. But, as respects the apparent cash shortage in the accounts of the new firm of Painter & Co. since the death of Jerome B. Painter, if regarded at all, it should be considered as a matter to be adjudged between the members of the new firm, consisting of Theodore P. Painter and J. Milton Painter, and having occurred solely on account of that portion of new business in which the new firm alone is entitled to share. It is evident that all sales of merchandise belonging to the old firm are sufficiently distinguished by the entries in the sales-book to disclose what portion of the cash was received from those sales; and for all of that portion the new firm will be accountable to the old firm, regardless of any cash shortage in their general cash account. The same is true of all debts collected on account of the old firm, which must be accounted for in full. But in so far as the estate of Jerome B. Painter may be shown, upon a new accounting, to be entitled to share in the profits of the new business, on the ground of the employment of its assets therein, the apparent cash shortage should be disregarded, for reasons heretofore stated.

10. Appellants claim that an erroneous credit was allowed Jerome B. Painter on account of the purchase of school lands, which the court finds to be the property of the firm, but which

appellants claim were purchased by Jerome B. Painter on his own private account. The proof that he did purchase these lands on his own private account is conclusive, unless it can be held to be overcome by an entry which stood upon the firm books for a long time prior to the death of Jerome B. Painter. The written contract for the purchase of these lands was made with B. F. Mauldin by Jerome B. Painter individually; and the account of the purchases was kept in his private cash-book, and never at any time entered to his credit on the journal or ledger, as payments made by him on account of the firm. They were afterward entered upon the ledger simply as a "Land Account," containing a memorandum of the moneys paid, and interest thereon, but not describing any lands whatever. Theodore P. Painter, who was not accustomed to inspect the books as a whole, did not discover this ledger entry until long after it had been made, but, as soon as he did discover it, protested against it. He testifies to a conversation then had with the respondent Dallam, in which he complained of the entry, and denied that the firm had anything to do with those school lands, and that Dallam then advised him to complain to Jerome, and, if he would not correct the matter, to bring suit. This conversation is not denied by Dallam. Theodore testified that he then had a personal interview with Jerome, and complained of the ledger entry, and wanted it changed, reminding Jerome that he (Theodore) had refused to enter into the purchase of the school lands, to which Jerome replied: "O, well, that is all right. I just entered it there for the time being." He further testifies that: "No reference was made to the school lands after the conversation I just spoke of. That gave me to understand that they were not intended for the company. He said the equivalent of that." It appears that Theodore P. Painter has uniformly denied that the firm was interested in the purchase of these school lands, and that the respondents, as coexecutors of the will of Jerome B. Painter, treated the school lands as his individual property after his death. In view of the whole evidence upon the subject of the purchase of these school lands, and especially in view of the fact that Jerome B. Painter never demanded or received a credit upon his account with the firm on account of the cash paid for them, the finding that these lands were the property of the firm of Painter & Co., and that Jerome

B. Painter should be credited with their price in the accounting, is against the evidence. There is nothing but this ledger entry, against Theodore's protests, to connect the firm, in any manner, with the contract of purchase. The lands were paid for out of the private funds of Jerome, and were taken in his name; and there is no pretense that the original investment was on account of any business in which the firm had an interest, or was agreed upon, in its inception, by both partners. In this respect there is an essential difference between the purchase of the school lands in the name of Jerome, and the taking of the Vandall lands in the name of Theodore, on account of a firm transaction, at the suggestion of Jerome, for which Theodore received a credit upon the journal in 1882, with Jerome's consent, and by his order to the bookkeeper. On no tenable ground, so far as appears from the evidence, can the investment made by Jerome in these school lands be held to have been the original purchase of property by him on account of the firm, and on no principle of justice can Theodore be compelled to take or pay for one-half of these school lands. In view of the protest made by Theodore, he cannot be held estopped by the entry of the so-called "land account" upon the ledger of the firm.

11. Appellants have printed in the transcript the original order appointing the receiver, with the affidavit upon which the same was based, and also an order refusing to discharge the receiver, with the affidavit and counter-affidavits used thereupon; but there is no appeal from either of these orders, and the affidavits are not made part of the record by any bill of exceptions, and therefore the correctness of these rulings cannot be reviewed upon this appeal. But the court has incorporated in its findings a fact, presumably based upon the evidence in the record, "that there was at the commencement of this suit, and ever since has been, and still is, great and imminent danger that the interest of J. B. Painter, and of his heirs and devisees, in the property of said firm would be entirely lost, and that the appointment of a receiver herein heretofore, and at the commencement of this action, made by the court, was and is proper, necessary, and warranted in the premises." This finding is not sustained by the evidence adduced upon the trial of the cause; and the further finding that, "since the death of said Jerome B. Painter, said surviv-

ing partner has so managed the business that he has, in large degree, lost the goodwill thereof, and has virtually wrecked the said business," has no evidence to sustain it. The ex parte showing made at the appointment of the receiver may have been sufficient, *prima facie*, to justify the order; but the whole of the evidence adduced at the trial shows that the appointment of the receiver was in fact unjustifiable, or at least that his appointment should not have been continued after the trial. The rule is well settled that the surviving partner being the one in whom the deceased himself reposed confidence, and being in law entitled to the possession and control of the firm assets, control should not be wrested from him, by the appointment of a receiver, without a clear showing of mismanagement or improper conduct, and of the danger of ultimate loss to the estate of the deceased partner: *Walker v. House*, 4 Md. Ch. 39-44; *High on Receivers*, sec. 497; *Bates on Partnership*, secs. 993, 999; 17 Am. & Eng. Ency. of Law, p. 115. In view of all the evidence adduced at the trial, the receiver should have been discharged by the court. I think the judgment and the order denying a new trial should be reversed and a new trial granted, to be conducted in accordance with the principles stated in this opinion.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, it is ordered that the order denying a new trial be reversed and a new trial granted, to be conducted in accordance with the principles stated in this opinion.

AFFLERBACH v. McGOVERN. . .

No. 15,276; May 26, 1894.

36 Pac. 839.

Replevin—Appeal.—In an Action to Recover the possession or value of personal property, the finding of the trial court will be affirmed when there is evidence to support it, though the evidence is conflicting.

APPEAL from Superior Court, City and County of San Francisco: William T. Wallace, Judge.

Action by C. H. Afflerbach against John McGovern to recover the possession or value of certain personal property. From a judgment for defendant and from an order denying a motion for a new trial plaintiff appeals. Affirmed.

J. C. Bates for appellant; J. W. Harding for respondent.

PER CURIAM.—This is an action to recover the possession or value of certain personal property. The court below gave judgment for the defendant, from which and from an order denying his motion for a new trial the plaintiff appeals.

This is a second appeal. In the opinion rendered on the former appeal (79 Cal. 268, 21 Pac. 837), the principal facts of the case are stated, and they need not therefore be repeated here. The court found that “the plaintiff was not, on August 12, 1880, nor at the time of the commencement of this action, nor at any other time, the owner, nor in the possession, nor entitled to the possession, of the goods and chattels in the complaint mentioned, nor of either or any of them”; and the only contention on the part of the appellant is that this finding was not justified by the evidence. This contention cannot be sustained. It is true that there was some conflict in the evidence; but when looked at as a whole, it appears to be clearly sufficient to justify and sustain the decision. The judgment and order appealed from must be affirmed, and it is so ordered.

PEOPLE v. BRADY.

No. 21,071; June 2, 1894.

36 Pac. 949.

Robbery—Evidence—Statements of Confederate.—Where defendant, in the presence of witness, by arrangement with his partner in crime, agreed that witness should accompany his partner, who should tell witness where the stolen property was, and that witness

should get it, and turn it over to defendant's partner, statements made to witness by such partner, in defendant's absence, as to where the property may be found, are admissible against defendant.

APPEAL from Superior Court, Los Angeles County;
Lucien Shaw, Judge.

Joseph Brady was convicted of robbery, and appeals. Affirmed.

N. C. Bledsoe for appellant; Attorney General Hart and Wm. H. Layson, deputy attorney general, for the people.

PER CURIAM.—The defendant appeals from a judgment and conviction of robbery, and asks a new trial upon various grounds. It is conceded that a robbery was committed, but it is claimed that the evidence at the trial was insufficient to identify the defendant as one of the robbers. Upon examination of the record, we consider the evidence amply sufficient in that regard. The robbery was committed by three men. It is now contended that the judgment must be reversed by reason of the admission in evidence of the statements of one of the robbers made to a third party, and not in the presence of the defendant, the day after the offense was committed. It is an elementary principle of law, which has been recognized by many of the decisions of this court, that the declarations and statements of a co-conspirator, made after the accomplishment of the conspiracy, in the absence of the defendant, are inadmissible: *People v. Moore*, 45 Cal. 19; *People v. English*, 52 Cal. 212; *People v. Aleck*, 61 Cal. 137; *People v. Gonzales*, 71 Cal. 569, 12 Pac. 783; *People v. Irwin*, 77 Cal. 494, 20 Pac. 56; *People v. Dilwood*, 94 Cal. 89, 29 Pac. 420. But the present objection and exception do not furnish a case coming within the principle of law declared in the foregoing authorities. Fairly construed, the circumstances as shown by the record are these: The defendant, in the presence of the witness, and by mutual arrangement with his alleged co-conspirators, agreed that the witness should accompany one of his partners in crime, who should inform him (the witness) where the stolen property was concealed, and that thereupon the witness should secure the possession of the property and turn it over to the co-conspirator. In pursuance of this plan,

and while the two were on the way to the spot where the property was concealed, the co-conspirator described the location of the place, and the stolen property was subsequently found at that point. It is now insisted that the statement made to the witness, in the absence of the defendant, as to the location of the stolen property, should not have been admitted in evidence. We think, under the foregoing circumstances, the defendant has no right to complain of the evidence admitted. The case stands exactly as though he himself had described to the witness the location of the stolen property. There is nothing additional in the record demanding our attention. Judgment and order affirmed.

Ex Parte CHATFIELD.

No. 21,128; June 4, 1894.

36 Pac. 948.

Habeas Corpus—Probable Cause for Commitment.—On application for discharge on habeas corpus, asked on the ground that petitioner was committed for obtaining money under false pretenses, without probable cause, in that the false pretenses were not proven by corroborating circumstances in addition to the testimony of one witness, as required by Penal Code, section 1110, the evidence must be taken as establishing all that it tends to prove.¹

Application of Chatfield for discharge on habeas corpus. Discharge denied.

S. C. Denson for petitioner; Piexotto, district attorney, for respondent.

PER CURIAM.—Petitioner was examined in the police court of the city and county of San Francisco on a charge

¹ Cited and followed in *In re Squires*, 13 Idaho, 628, 92 Pac. 755, the court saying: "The state is not required to establish the guilt of the defendant beyond a reasonable doubt, as upon the trial, and, the phrase 'reasonable or probable cause' is not equivalent to 'beyond a reasonable doubt.'"

of obtaining money under false pretenses, and was committed for trial to the superior court. He asks to be discharged on habeas corpus, under subdivision 7 of section 1487 of the Penal Code, upon the ground that he was committed without reasonable or probable cause. His contention is that the evidence was not sufficient to warrant his being held, in that the alleged false pretense was not "proven by the testimony of two witnesses, or that of one witness and corroborating circumstances," as required by section 1110 of the Penal Code. There was, as appears by the record, but one witness to the false pretense—the prosecuting witness; but after a careful examination of all the evidence upon which the commitment was based, and applying, as we must, the rule that the evidence is to be taken as establishing all that it tends to prove, we are not prepared to say that there are no corroborating circumstances within the purview of the section relied upon. For these reasons the petitioner must be remanded, and it is so ordered.

FITZGERALD v. FITZGERALD et al.

No. 15,357; June 5, 1894.

36 Pac. 947.

Appeal—Delay in Taking—Dismissal.—An appeal, not having been taken within the statutory time, will be dismissed.

APPEAL from Superior Court, Santa Clara County; John Reynolds, Judge.

Action by Fitzgerald, administrator, against Fitzgerald and others. Judgment for defendants, and order denying new trial. Plaintiff appeals. Appeal from judgment dismissed. Order affirmed.

Archer & Bowden and J. H. Campbell for appellant; Wilcox & Patton for respondents.

McFARLAND, J.—Plaintiff appeals from the judgment and from an order denying his motion for a new trial. The

appeal from the judgment, not having been taken within the statutory time, must be dismissed. The only question presented on the appeal from the order denying a motion for a new trial is this: Was the evidence sufficient to sustain the facts found by the court? The facts found were these: "First. Walter Fitzgerald, deceased, did not in his lifetime enter into any agreement or have any understanding with the defendants, or either or any of them, that they would enter into a copartnership of any character. Second. No copartnership business was in fact entered upon or conducted by the said defendants, or either or any of them, with or for the said Walter Fitzgerald in his lifetime." We have thoroughly examined the evidence, and we think it fully sufficient to support said findings. A detailed statement here of the testimony as disclosed in the transcript would serve no useful purpose. The appeal from the judgment is dismissed, and the order denying the motion for a new trial is affirmed.

We concur: Fitzgerald, J.; De Haven, J.

GREEN v. BARNEY.

No. 15,321; June 12, 1894.

36 Pac. 1026.

Vendor and Vendee—Rescission by Former.—B., Having Defendant's contract to sell him certain land, died, leaving a balance overdue and unpaid. The contract had not then been rescinded, but defendant made no claim against B.'s estate. Plaintiff, B.'s successor in interest, told defendant that she could not complete the purchase, and suggested a division of the land. Defendant refused, but offered to sell her the land, without counting B.'s payments, for a price considerably more than the balance due on the contract. Plaintiff said she would rather keep to the old contract, but was told there was no old contract to keep to. Later, plaintiff wrote defendant that she was now able and willing to pay the amount due, and requested an account, which was furnished, with a letter from defendant's attorney to the effect that defendant did not recognize plaintiff's right to the information. Held, that defendant had rescinded.

Vendor and Vendee—Offer to Pay—Waiver.—Civil Code, section 1496, provides that, unless an offer of performance be accepted, the thing to be delivered need not be actually produced. Section 1501 declares that all objections to the mode of an offer which could be stated at the time to the person making the offer, and could be then obviated by him, are waived unless then stated. Held, that, in case of an offer to pay money, actual production of it is waived unless demanded at the time.

Vendor and Vendee—Rescission by Former.—A Vendor Who, After Receiving money on the contract, rescinds it for the vendee's breach, has the burden to show, as against the vendee's claim for return of the money, what damages he has sustained by the breach.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by A. H. Green against Mary E. Barney for money had and received. Judgment for defendant. Plaintiff appeals. Reversed.

M. Cooney for appellant; Blake, Williams & Harrison for respondent.

VANCLIEF, C.—On January 1, 1886, a written agreement was executed by and between the defendant and E. H. Bray, whereby the former agreed to sell and the latter to purchase a lot of land (sixty acres) situated in Contra Costa county, at the price of \$3,750, of which price \$200 were paid on the date of the agreement, and \$550 were to be paid January 1, 1887, and the remainder (\$3,000) on or before January 1, 1889, deferred installments to bear interest at eight per cent per annum. It was further agreed that time should be of the essence of the contract, and that the \$200 paid should be forfeited in the event of Bray's failure to pay the deferred installments according to the agreement. One Blackmar being in possession of the land under a cropping lease, it was further agreed that Bray should have the benefit of the landlord's share of the crop on the land at date of the agreement, but that the proceeds of the sale thereof should be applied on said deferred installments, and that possession of the land should be given to Bray upon the surrender thereof by Blackmar. Bray died September 14, 1889, having paid only \$1,825 on the contract, but the contract had not been

rescinded before his death. The plaintiff, having succeeded to all the rights and interest of Bray in the contract, of which there is no question, brought this action to recover the said sum of \$1,825 paid by Bray in his lifetime. The cause having been tried by the court without a jury, and findings of fact having been waived, the judgment of the court was in favor of the defendant, from which, and from an order denying her motion for a new trial, the plaintiff has appealed.

As the appeal from the judgment was not taken within one year from the entry thereof, it should be dismissed. On the appeal from the order denying a new trial, which was properly taken, the appellant contends that material implied findings of fact, on which the judgment necessarily rests, are not justified by the evidence. If the contract had not been rescinded before the commencement of the action, or if, in case it had been rescinded, by reason of a breach thereof by plaintiff, on account of which defendant suffered damages in a sum equal to the amount of the payments made by Bray, then the judgment in favor of defendant was right; otherwise it was wrong, and should be reversed. Therefore, the judgment for defendant implies that the court must have found either that the contract had not been rescinded, or that the rescission thereof was owing to a default of the plaintiff, whereby defendant suffered damages in a sum equal to, and sufficient to cancel, the payments made by Bray: *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774, and cases there cited. I think the evidence, without substantial conflict, shows that the contract was abandoned by defendant after the death of Bray, on account of the default of the plaintiff in failing to pay the remainder of the purchase money; that such abandonment was acquiesced in by plaintiff before the commencement of this action, whereby a rescission of the contract was consummated; and that the evidence does not justify a finding that, by reason of plaintiff's default, the defendant sustained damages in a sum equal to, and sufficient to cancel, the payments made by Bray, to wit, \$1,825.

1. The undisputed evidence as to the abandonment and rescission of the contract is substantially as follows: Soon after the death of Bray, the plaintiff signified her inability to complete the purchase, and requested an equitable division of the land on the basis of the purchase money paid by Bray,

to which defendant did not assent; but defendant proposed to sell the land to plaintiff at the price of \$50 per acre, independent of, and without accounting for, the payments made by Bray, which offer was not accepted by plaintiff. It should be noted that this proposal to sell the land to plaintiff at a price exceeding the amount due on the contract by \$1,070 is inconsistent with the claim that defendant considered the contract in force. On the fifteenth day of August, 1890, plaintiff addressed a letter to defendant, saying that she "was now ready, willing and able to pay the actual amount due," and requesting information as to the payments made by Mr. Bray in his lifetime, and of the actual amount due on the contract. Defendant requested her attorney to answer this letter, which he did by letter dated August 18, 1890, saying: "While Mrs. Barney does not wish to be understood as recognizing any right on your part to the information you ask for, she has no objection to giving it." This letter inclosed a copy of the contract, with a statement of payments made by Mr. Bray, but did not state that any amount was due, nor express a willingness on the part of the defendant to accept any further payment on the contract. The only further communication between the parties after this letter was a letter from plaintiff to defendant, dated August 21, 1890, demanding payment by defendant of the sum of \$1,825, paid by Bray, with interest. At an interview between plaintiff and defendant early in August, 1890, in the presence of defendant's son, who had acted for her in the matter, the defendant proposed to give plaintiff an option to purchase the land within a specified period at \$50 per acre. In declining this proposal, plaintiff said she "would rather adhere to the old contract." To this the son, in the presence of his mother, replied: "There must be some misunderstanding concerning the contract. There is no old contract for you to adhere to." To this statement of her son the defendant said nothing. The defendant testified that she understood plaintiff's letter to her, of August 15, 1890, as an "unequivocal declaration that she [plaintiff] was able and willing and intended to pay for this land pursuant to the contract"; and also testified that she (defendant) was in possession of the land, but did not say when she took possession. The plaintiff, however, testified that defendant "has always been in the possession of that land," and this testimony

was not disputed. As to whether plaintiff verbally offered to pay the remainder of the purchase money prior to the offer made by the letter of August 15, 1890, the testimony of plaintiff and defendant is conflicting, but there is no evidence in conflict with that above stated. The objection that plaintiff's written offer to pay was ineffectual because the money offered was not actually produced is not tenable. The defendant had an opportunity to object to the sufficiency of the offer on the ground that the money was not produced, and, had she done so, the plaintiff could have obviated the objection; and, since defendant failed to object on any ground, she thereby waived the objection here made: Civ. Code, secs. 1496, 1501. Her denial of plaintiff's right to the information asked in the letter of August 15th, without which plaintiff was unable to compute the amount due on the contract, plainly indicated not only that the payment of that amount was not desired, but that defendant repudiated the contract, and, as the letter was carefully drawn by defendant's attorney, it cannot be otherwise understood. Perhaps it may not be irrelevant, under this head, to observe that, although it was expressly admitted at the trial that the estate of Bray had been fully administered and distributed before the commencement of this action, there was no evidence that defendant made or presented any claim whatever against the estate.

2. Assuming that the court may have found, as it should, that the contract was abandoned and rescinded after the death of Bray, it remains to be determined whether the evidence justifies a finding that the damage to defendant in consequence of the breach of the contract by plaintiff equaled and canceled the payments made by Bray. In view of the contingency that the court should find that the contract had been rescinded, the defendant alleged in her answer that by reason of the breach of the contract she had suffered damages in the sum of \$2,023, but specified no particular damage except that she had lost the crop on the land at the time of the sale, which she avers was of the value of \$700. At the trial, however, the defendant called and examined several witnesses as to the value of the land, the effect of whose testimony was that the market value of the land would average at least \$45 per acre from January 1, 1889, until the time of the trial, and consequently that the whole (sixty acres) was of the market

value of \$2,700, which is only \$350 less than the contract price, exclusive of the crop, which defendant values at \$700. Conceding that defendant was entitled to recover as damages the difference between the contract price and the depreciated market value of the land, and also \$700 for the crop, amounting to \$1,050, still plaintiff would be entitled to judgment for the difference between this amount and the \$1,825 paid on the contract, which is \$775. It is not intended, however, to estimate or find the amount of damages to which the defendant was entitled according to the evidence, but only to decide, as matter of law, that the evidence does not substantially tend to prove that defendant was damaged to the extent of \$1,825, as must have been found by the trial court; in other words, that the damages found are excessive, and not warranted by the evidence. The question of damages, as well as that of rescission of the contract, will be open to additional evidence on a new trial. All that is conclusively decided on this appeal is that the evidence contained in the statement on motion for new trial is insufficient to justify a finding either that the contract was in force at the time the action was commenced, or that the damages suffered by defendant were sufficient to cancel the payments admitted to have been made by Bray. No question as to what is the proper rule by which to measure the damages is involved in this appeal. I think the appeal from the judgment should be dismissed, and that the order denying a new trial should be reversed and the cause remanded for a new trial.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion it is ordered that the appeal from the judgment be dismissed, and that the order denying a new trial be reversed and the cause remanded for a new trial.

IN RE KENNEDY'S ESTATE.*

No. 15,415; June 12, 1894.

36 Pac. 1030.

Estate of Decedent—Determination of Heirship—Illegitimate.—

On an issue whether petitioner was testatrix's illegitimate daughter, the exclusion of evidence that testatrix had never mentioned having any daughter was not prejudicial, where petitioner not only made no claim that testatrix had ever recognized her as her daughter, but produced evidence that she had not.

Evidence—Book of Registered Letters.—Petitioner introduced evidence tending to show that she received at Buffalo a letter signed C. K. (testatrix's name), containing a railroad ticket and five dollars. It was shown that the address of C. K. was at 616½ N. street, and that at about that time she borrowed five dollars to send, as she said, to her sister at Buffalo. Held, that petitioner might introduce from the book of registered letters of the San Francisco post-office an entry reciting the receipt of a letter from C. K., 616½ N. street, addressed to M. R. (petitioner), Buffalo.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Petition by Mary Rogers, setting out that she was the daughter of Catherine Kennedy, deceased, and asking for such share in the estate as if deceased had died intestate. From a judgment for petitioner, and an order denying a new trial, J. T. McCormick, executor of the will of J. E. Tomlinson, devisee under the will of Catherine Kennedy, appeals. Affirmed.

Eugene N. Deuprey for appellant; M. J. Platshek, M. S. Eisner and F. S. Stratton for respondent.

SEARLS, C.—Catherine Kennedy died testate at the city and county of San Francisco, April 13, 1887, leaving estate of the value of about \$12,000. She was thrice married, and left surviving her one son by her second marriage, named John E. Tomlinson. By her last will she devised all of her estate to the said son, John E. Tomlinson, except three small legacies

*For subsequent opinion in bank, see 104 Cal. 429, 38 Pac. 93.

of \$100 each, bequeathed to Sarah McCloskey, John E. McCormick and Rosa Malone, respectively, and naming James McCloskey as executor. The will was admitted to probate, McCloskey appointed executor thereof, and such proceedings were had in relation thereto that on the eleventh day of December, 1889, a petition was filed by the executor praying a distribution of the estate as in the will provided. On the twenty-third day of December, 1889, Mary Rogers made and filed her petition and opposition in the cause, in which, among other things, she set out that she was the daughter of Catherine Kennedy, deceased; that, by an omission not appearing to be intentional, deceased wholly failed to provide for petitioner in her last will; that she is entitled to a like share or interest in the estate as though deceased had died intestate, and prayed that one-half of said estate be distributed to her. Thereafter, on the twenty-third day of December, 1891, the matter of the petition of Mary Rogers to participate in the distribution of the estate of said Catherine Kennedy, deceased, came on to be heard. A trial by jury was waived by the parties. The contest was between said Mary Rogers and J. T. McCormick, the executor of the last will of J. E. Tomlinson, deceased, who had before that time departed this life. The question in litigation was as to the maternity of the said Mary Rogers. The decision was in favor of the respondent, said Mary Rogers, who was found to be the illegitimate daughter of Catherine Kennedy, the testator, and one-half of the estate was distributed to her. The appeal is from the decision, and from an order denying a new trial to said McCormick, executor of the last will of said Tomlinson, deceased.

At the trial, counsel for appellant asked Kate Smith, a niece of Catherine Kennedy, deceased, who was a witness on his behalf, the following question: "Did you ever hear of any other child than J. E. Tomlinson?" Questions of like import were also asked of Mary Matthews and Mary McCormick, to all of which questions objections were made by counsel for petitioner, upon the ground that the testimony was incompetent, irrelevant and immaterial. The objections were sustained by the court, and exceptions taken. J. T. McCormick was also called as a witness on the part of appellant, to whom the following questions were put: "At any time did Mrs. Kennedy, in speaking of the incidents of her youth, speak of any

daughter of hers, legitimate or illegitimate? A. No. Q. Whom, if any, did you know or observe as the members of the family of Catherine Kennedy during her lifetime? A. The only person that I was acquainted with was John Edward Tomlinson." These answers were, on motion of respondent's counsel, stricken out upon like grounds. These rulings are severally assigned as errors. The theory of appellant is that the question of pedigree and relationship was the main issue in the case, and that the testimony of the witnesses above specified contradicted the claim of the illegitimate Mary Rogers, and hence was proper evidence under the Code of Civil Procedure, section 1852, and subdivision 11 of section 1870. Section 1852 of the Code of Civil Procedure is as follows: "The declaration, act or omission of a member of a family, who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible." Subdivision 4 of section 1870 provides as follows: "The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage or death of any person related by blood or marriage to such deceased person," etc., may be proven. And by the eleventh subdivision of the same section it is provided that common reputation existing previous to the controversy respecting pedigree, among other things, may be proven. That the acts and declarations of the deceased, Catherine Kennedy, in respect to the relationship of Mary Rogers to her, in a proper case, and where the question is in issue, are admissible, is beyond dispute. The evident object of the inquiry in the present case was, as is shown by the evidence stricken out, as well as by the testimony of other witnesses, who testified without objection, to show that the deceased never spoke of the petitioner as a daughter, and that she was not reputed to be a child of the deceased woman or a member of her family.

Now, the whole theory of the case, as made by the affirmative testimony of the respondent here, was that there never was any recognition of the relationship by her deceased mother, but that, on the contrary, it was studiously concealed from the world. According to that theory, the respondent was born in Ireland; that her mother came to America a few years later, leaving her with her aunts, who still later, but in the

early childhood of respondent, brought her to America and settled with her near Buffalo, New York, where she remained until over forty years of age; that her mother, whom she scarcely saw in America, went to New Orleans, where she settled and was twice married, having two sons, one of whom died, and removed to San Francisco, and married Kennedy, who also died; that deceased learned the address of respondent in Buffalo, New York, and wrote to her there in 1886, inviting her to come to California, inclosing a passage ticket for the trip and five dollars in cash; that in the letter she addressed her as her daughter, and signed herself as her mother, but cautioned her that she "must not call her mother when she did come, because of her son, who did not know of the existence of this child of hers; that her son was a violent and a drinking man, and would be very angry and make trouble if he knew of this illegitimate child"; that when she reached San Francisco her mother met her at the ferry, and, upon becoming known to each other, one of the first cautions of the mother was not to let it be known that she was a daughter; that she was introduced as a niece, remained with her mother not exceeding four or five days, and, finding the place uncongenial, went out to service, and never returned more than a few times to her mother's home. There is no claim whatever of recognition, but, as before stated, affirmative evidence that there was none. In the face of this showing, it is hard to see how the case of appellant would have been made stronger had the negative evidence been admitted. If we concede that striking out the testimony introduced and the exclusion of that offered was technically erroneous, it must be said that the appellant was not injured thereby. The testimony of the witnesses Eisner and Platshek was properly admitted, not as evidence to the main issue, but to contradict and impeach the testimony of the witness James McCloskey as to his statements previously made. It was of trifling importance, but, being admissible, constituted no error. The respondent, having introduced evidence tending to show that she received at Buffalo, New York, a letter from San Francisco, signed by Catherine Kennedy, containing a railroad ticket and five dollars in cash, was permitted, against the objection of appellant's counsel, to introduce in evidence from the book of registered letters of Station B, San Francisco postoffice, the following: "No. 1,637.

Received March 16, 1886, of Catherine Kennedy, 616½ Natoma street, addressed to Mary Rogers, Buffalo, New York." There was evidence that the address of Catherine Kennedy was at 616½ Natoma street, and that at about that date she procured from James McCloskey five dollars to send, as she said, in a letter to her sister at Buffalo, New York. The testimony was proper as affording some evidence that the registered letter came from the deceased, Mrs. Kennedy. The identity of name and address was evidence of identity of person.

The only remaining question relates to the sufficiency of the evidence to support the finding that the respondent, Mary Rogers, was the illegitimate daughter of Catherine Kennedy. That the testimony of the respondent, coupled with that of Caroline F. Judd and Mary H. Huntley, supported as it is in a few minor particulars by other testimony, is sufficient, if true, to support the finding, cannot be seriously doubted. Knowing the incentives in such a case to simulate facts and to concoct statements at variance with truth, I have examined with care all of the testimony in the case, only to come to the conclusion that the statements of the respondent as a witness are indicative of a disposition to give utterance to the truth, and that when the whole evidence upon both sides is scanned, and its intrinsic merits compared, the conclusion is fairly deducible, not only that there was sufficient evidence to uphold the findings, but that the preponderance of evidence was and is with the respondent. The order and decision appealed from should be affirmed.

We concur: Belcher, C.; Vanclicf, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order and decision appealed from are affirmed.

LANCASTER et al. v. MAXWELL et al.*

No. 15,017; June 12, 1894.

37 Pac. 207.

Appeal—Service of Notice.—Under Code of Civil Procedure, section 940, providing that notice of appeal must be served on every “adverse party,” an appeal (in an action by a subcontractor against the original contractor and the land owner to enforce a mechanic’s lien) by the land owner from a judgment ordering the sale of the land (any deficiency to be docketed as a personal judgment against the contractor) will be dismissed where no notice thereof is served on the contractor.

APPEAL from Superior Court, City and County of San Francisco; Eugene R. Garber, Judge.

Action by J. R. Lancaster and others against Thomas Maxwell and C. B. Gregory. There was a judgment for plaintiffs, and defendant Gregory appeals. Dismissed.

Ash & Mathews for appellant; Wickliffe Matthews and A. D. Lemon for respondents.

McFARLAND, J.—This is an action to foreclose certain mechanics’ liens. Defendant Gregory is the owner of the buildings involved and defendant Maxwell was the original contractor. Both defendants suffered default. The liens sued on grew out of labor and materials done for and furnished to the contractor, Maxwell. By the judgment it was decreed that the land, buildings, etc., of Gregory be sold, and the proceeds appropriated to the payment of the amounts found due upon the liens, and that if such proceeds should not be sufficient to pay all the liens “the deficiency thereof shall be docketed as a personal judgment against said defendant Thomas Maxwell.” The defendant Gregory appeals from the judgment, and also from an order denying her motion to set aside her default, made upon the grounds of surprise, excusable neglect, etc. The notice of appeal was not directed to or served upon the codefendant, Maxwell, and, for that reason, respondents move to dismiss the appeal.

*For former opinion, see 103 Cal. 67, 36 Pac. 951.

The court did not abuse its discretion in refusing to set aside the default; and while we have looked through the transcript and briefs, and see no reason why the judgment should, under any view, be reversed, it is not necessary to discuss the other points suggested, because we think that the appeal should be dismissed. A notice of appeal must be served on every "adverse party": Code Civ. Proc., sec. 940. And adverse parties are those who are "interested in the judgment, and would be affected by its reversal": *O'Kane v. Daly*, 63 Cal. 319. "Every party whose interest in the subject matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an 'adverse party' within the meaning of these provisions of the code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervener": *Senter v. De Bernal*, 38 Cal. 637. And it is quite clear that in the case at bar the interest of Maxwell would be "affected by the reversal" of the judgment. Appellant seeks particularly a reversal of that part of the judgment which decrees her property to be sold to satisfy the liens, and it is apparent that such reversal would be adverse to the interest of Maxwell. The appeal is dismissed.

We concur: De Haven, J.; Fitzgerald, J.

DE LONG v. WARREN.

No. 14,924; June 13, 1894.

36 Pac. 1009.

Public Street—Changing Grade—Damages.—Under Constitution of 1879, article 1, section 14, providing that private property shall not be taken "or damaged" for public use without just compensation having been first made, damages peculiar to property of an abutting owner may be recovered of one who fills earth into a street to conform to a new grade to which it had been lawfully changed, though he is duly authorized to do so.¹

¹ Cited in a note in 36 L. R. A., N. S., 1201, on the liability of a municipal corporation for injury to abutting owners from changing the grade of a street under the constitutional provision against "damaging" private property for public use without compensation.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by Elida De Long against C. A. Warren. Judgment for plaintiff. Defendant appeals. Affirmed.

J. C. Bates for appellant; Henley & Swift for respondent.

PER CURIAM.—This action was brought to recover damages caused by the regrading of a street upon which plaintiff is an abutting proprietor. The complaint was not verified. The answer denied all the allegations of the complaint, and averred that the acts complained of consisted in the performance by him of the work of grading Frederick street, between De Long avenue and Ashbury street, in the city and county of San Francisco; that the work was done in a good and workmanlike manner and not otherwise; and that the damage to the property of plaintiff, if any, is by reason of the lot of the plaintiff being below the official grade of said street as established by the board of supervisors. The court found that the plaintiff was the owner of a lot having a frontage of one hundred and eighty-five feet on Frederick street, in the city and county of San Francisco, and extending to the center of said street; that on June 1, 1890, the defendant entered upon said street, and dumped rock, sand, gravel and other material into and upon the street in front of plaintiff's lot, and raised the grade five feet above what it was previously; that plaintiff was injured thereby, her grounds lessened in value, etc., to the extent of \$350, which injury and damage is peculiar to her property, and does not affect the property of any other landed proprietor, etc.; that defendant is continuing and threatens to continue said trespass, etc., and will do so unless restrained. The court concluded the acts a nuisance, and rendered judgment in favor of plaintiff for \$350, and enjoined defendant from further and like acts in the premises. Defendant appealed from the judgment and from an order denying a motion for a new trial.

We are of opinion the judgment and order appealed from should be affirmed. Conceding, without deciding, that defendant could, without pleading the facts in justification of his acts, show that the grade of Frederick street had been

lawfully changed by the board of supervisors, and raised above the former official grade, and that defendant was duly authorized to fill the street to such new grade, and that such filling constituted the grievance of which plaintiff complains, and the fact is still patent that by the alteration of the grade, and filling the street to conform thereto, the property of the plaintiff was damaged, and that such damages were, as found by the court, "peculiar to her property, and do not extend to or affect the property of any other landed proprietor on said street." Section 14 of article 1 of the constitution of California, adopted in 1879, is as follows: "Private property shall not be taken or damaged for public use without just compensation having been first made," etc. Under our former constitution, which provided that "private property shall not be taken for public use without just compensation," it was held in this state, in uniformity with the decisions in most other states with like clauses in their constitutions, that persons appointed or authorized by law to make or improve public streets are not answerable for consequential damages, if they act within their jurisdiction, and with care and skill: *Shaw v. Crocker*, 42 Cal. 435; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336. Under the clause of the present constitution above quoted the rule is reversed, and in *Reardon v. City and County of San Francisco*, 66 Cal. 492, 56 Am. Rep. 109, 6 Pac. 317, it was held the municipal corporation was liable for such special consequential damages resulting from a street improvement as the adjoining land proprietors suffered over and above the common injury to the other abutters on the street, or the general public. The point decided there is conclusive of the questions here, and need not be elaborated. The other points made are either unimportant or unsupported by the record. The judgment and order appealed from are affirmed.

WARNER v. F. THOMAS PARISIAN DYEING & CLEANING WORKS.*

No. 15,266; June 19, 1894.

37 Pac. 153.

Appeal—Record.—The Action of the Court in Granting a new trial must be affirmed where the grounds for granting the same are not stated.

Appeal—Amendment of Statement.—After the Statement of the case has been settled for an appeal, the court can allow additions to be made thereto, though the omissions arose from the negligence of the attorney.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Seth Warner against the F. Thomas Parisian Dyeing & Cleaning Works. There was a judgment for plaintiff, and, from an order granting defendant a new trial, plaintiff appeals. Affirmed.

Horace W. Philbrook for appellant; Reinstein & Eisner for respondent.

PER CURIAM.—A verdict was rendered in this cause in favor of the plaintiff for \$1,321. The defendant moved for a new trial upon several grounds, one of which was that the evidence was insufficient to justify the verdict. The court granted the motion without specifying the ground upon which it made the order, and from this order the plaintiff has appealed.

Upon well-established rules, the action of the court must be affirmed: *Crooks v. Miller*, 89 Cal. 35, 26 Pac. 615; *Kauffman v. Maier*, 94 Cal. 269, 18 L. R. A. 124, 29 Pac. 481; *Domico v. Cassassa*, 101 Cal. 411, 35 Pac. 1024; *People v. Flood*, 102 Cal. 330, 36 Pac. 663; *Mills v. Navigation Co.*, 102 Cal. 357, 36 Pac. 772.

After the statement of the case had been settled by the judge and filed with the clerk, it was brought to the notice of

*For subsequent opinion, see 105 Cal. 409, 38 Pac. 960.

the court that the statement was incomplete, in that several exhibits referred to therein had not been engrossed at length, although it was recited in the statement that it contained all the material evidence taken at the trial of the action. The defendant's attorney thereupon moved the court that the settlement and allowance of the statement be vacated, and that they be allowed to re-engross the same, and place these exhibits therein. This motion was resisted by the attorney for the plaintiff, but, after a hearing of the parties, was granted; and the plaintiff's attorney excepted to this action of the court. We see no error in this proceeding. Courts of justice are organized for the purpose of determining the controversies between litigants according to their respective rights; and rules of procedure are intended to facilitate this purpose, rather than to hamper or obstruct the action of the court in determining which of the parties is entitled to a judgment. Section 659, Code of Civil Procedure, makes it the duty of the judge, in settling the statement, to make it "truly represent the case, notwithstanding the assent of the parties to any inaccurate statement." If the judge shall become satisfied that a statement, as settled by him, does not truly represent the case, he is authorized, and it is his duty, to make such corrections therein as will cause it to conform to the facts. In the present case the defendant's attorney, in preparing the proposed statement, had included therein a reference to these exhibits by inserting the words, at the place where they were referred to, "here insert plaintiff's exhibit ——," so that the plaintiff's attorney was not misled in preparing amendments thereto; and, when the attention of the judge was drawn to the fact that the exhibits had not been engrossed in the statement, he was authorized to vacate his certificate of settlement, and direct that they be engrossed therein, so that his certificate may conform to the facts. Whether the omission to engross them was the result of inadvertence or carelessness on the part of the defendant's attorney did not deprive the court of a discretion to settle it correctly; and, for the purpose of determining what exhibits were in reality referred to in the statement, it was authorized to make such investigation as would enable it to settle the statement according to the facts. The order is affirmed.

ADAMS v. FARNSWORTH et al.

No. 15,312; June 25, 1894.

37 Pac. 221.

Appeal.—Findings by the Court will not be Disturbed on appeal where there is evidence to justify them.

Trial—Curing Rejection of Testimony.—Error in refusing to permit the maker of a note to testify on cross-examination as to the circumstances under which he signed the note—the witness having been called by plaintiff for the purpose simply of proving his signature—is cured by his testifying in his own behalf in regard thereto.

APPEAL from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by Charles Adams against A. D. Farnsworth and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

W. C. Kennedy for appellants; Wm. H. Jordan and S. F. Leib for respondent.

PER CURIAM.—This action was brought by plaintiff to recover on the following promissory note:

“\$2,000.00.

San Jose, Feb. 4, 1888.

“Thirty days after date, for value received, we, jointly or severally, promise to pay Chas. Adams the sum of \$2,000 (two thousand dollars), with interest thereon from date until payment at the rate of — per centum per annum, payable in thirty days. and, if not so paid, then to be added to, and become a part of, the principal, and bear a like interest; said principal and interest to be paid in United States gold coin only. If any interest on this note be not paid within a month after it becomes due, then the whole of the principal and interest shall, at the option of the payee, become and be immediately due and payable.

“A. D. FARNSWORTH.

“D. R. MARTIN.

“G. WENDT.”

The defendants, Martin and Wendt, in their answer, deny that they executed the note for value received, and aver that their signatures thereto were procured by fraudulent and false representations made to them by plaintiff and their co-defendant Farnsworth. It is further averred that plaintiff duly released them from all liability on said note, and that the same has been fully paid and discharged. Plaintiff had judgment against the defendants Martin and Wendt. Farnsworth, the other defendant, who was never served with process, made no appearance. From which judgment, and the order denying their motion for a new trial, the defendants Martin and Wendt appeal.

The court, in its decision, found that all the allegations of the complaint were true, and also found adversely to the defendants upon all of the defenses set up in their answer; and, as these findings are fully justified by the evidence, they will not, under the well-established rule of this court, be disturbed.

It is claimed by appellants that the court erred in sustaining plaintiff's objection to the following question propounded on cross-examination by counsel for the defense to the defendants Martin and Wendt, while upon the stand as witnesses for plaintiff, who introduced them as such solely for the purposes of proving the signatures to the note: "Q. State under what circumstances you signed that paper" (referring to the note in question). Conceding, for the purpose of this case only, that the court erred in making the ruling complained of, the error was cured by these witnesses subsequently testifying in their own behalf as to the circumstances under which they signed the note.

As the remaining errors complained of are either untenable or immaterial, it follows that the judgment and order should be affirmed, and it is so ordered.

PHILLIPS v. WINTER et al.

No. 15,177; June 26, 1894.

37 Pac. 154.

Partition—Res Judicata.—A Party to an Action for Partition, who acquires an independent title by deed pending the suit and before decree and who does not assert such title in that action will be concluded by the judgment therein from setting up such title in a subsequent action for the partition of the same property.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Abraham Phillips against Fanny M. Winter and others for partition. Judgment for plaintiff and defendants appeal. Affirmed.

Daniel Titus and Henry Sears for appellants; I. N. Thorne and Myer Jacobs for respondent.

PER CURIAM.—The plaintiff commenced this action to obtain a partition of certain blocks and lots of land situate in the city and county of San Francisco and known as “outside lands.” There were a large number of defendants, all of whom answered, and set out their respective claims to interests in the lands described in the complaint. Among the defendants were the minor heirs and the adult heirs, and the executrices of the will of William Winter, deceased. The minor heirs answered separately by their guardian ad litem, and alleged that said William Winter, at the time of his death, was the owner and entitled to the possession of an undivided third part of all the lands and premises described; and they prayed that the said lands be partitioned, and that the shares and interests to which they were entitled might be determined by the court, and set off in severalty to them. The adult heirs and executrices, by their answer, denied that the plaintiff and defendants were the owners, as tenants in common, of the lands and premises described in the complaint; denied that the plaintiff or the defendants, other than themselves, had any interest in the said lands and premises, or any

part thereof, as tenants in common or otherwise; and alleged that said William Winter, in his lifetime, and at the time of his death, was seised in fee, and was the owner in severalty, of all the said pieces and parcels of land mentioned and described in the complaint. Wherefore they prayed that it be adjudged and decreed by the court that they were the owners and entitled to the possession of all the said lands and premises, and that the relief asked by the plaintiff be denied. The case was tried, and very full findings made, by which it was determined that each of the parties to the action had a certain stated interest in the said premises; and thereupon, in accordance with the findings, an interlocutory decree of partition was made and entered, from which, and from an order denying their motion for a new trial, the adult heirs and executrices appeal.

The appellants contend that the heirs, devisees, and representatives of the estate of William Winter, deceased, were shown to be the owners in fee and entitled to the possession of all the property involved in the action, and that the court erred in awarding and setting off portions thereof to the plaintiff and the other defendants. This contention is based upon the following facts: On November 20, 1869, an action was commenced in the district court of the twelfth judicial district in and for the city and county of San Francisco, by Robert S. Randall against William Winter and others, for the partition between the parties, as tenants in common, of a tract of land described as "that certain tract of land situated in the city and county of San Francisco and state of California, known as and being the southeast quarter of section 13, township 2 south, range 6 west, according to the United States survey of the state of California, and being more particularly described as the same is delineated and shown on the map of the outside lands of the city and county of San Francisco, made under and by virtue of the provisions of order No. 800, as follows, to wit, 'All those certain blocks of land,' " etc., including the blocks and lots involved in this action. The answer of Winter was filed March 4, 1870. The trial of the action was commenced August 15, 1871, and on the next day the case was submitted to the court for decision. The interlocutory decree was entered October 13, 1871, and the final decree on December 8, 1875. By these decrees there were

allotted and set off to the plaintiff, Randall, in severalty, all the blocks and lots of land described in the complaint in this action; and the said decrees are still in full force and effect, having never been set aside, vacated or reversed, and under deeds from Randall the several parties to this action have acquired the interests in the property which were respectively allotted and set off to them. While the action of *Randall v. Winter et al.* was pending, and before the interlocutory decree therein was entered, seven deeds were executed by the city and county of San Francisco to said Winter and his codefendants, purporting to convey to them, in pursuance of the authority given by the statutes of the United States and of this state, and said order No. 800, the property involved in that action, and including that involved in this action. Two of the said deeds were dated May 6, 1870; two of them, July 8, 1870; one of them, October 20, 1870; one of them, October 7, 1871; and one of them October 9, 1871. But it does not appear what particular part of the lands was conveyed by either of the said deeds. Subsequently, his cograntees executed and delivered to said Winter deeds purporting to convey to him all their respective interests in the lands involved in this action. Under the several deeds above referred to, appellants claim that Winter, at the time of his death, was the owner and entitled to the possession of all the lands in controversy; and whether this claim can be sustained or not is the question to be decided. We do not deem it necessary to discuss the matter at length, for in *Christy v. Waterworks*, 68 Cal. 73, 8 Pac. 849, a like question arose, and was decided against the contention of appellants. That case grew out of the same partition suit of *Randall v. Winter*; and there, as here, a city deed, received by a tenant in common pending the partition proceedings, was set up as a defense to the action. It was held that the judgment in partition was conclusive upon all the parties thereto as to whatever title or claim they had to the land at the time of the rendition of the judgment, and on the second appeal of the case the same doctrine was announced and followed: 84 Cal. 541, 24 Pac. 307. Those decisions, we think, correctly declare the law applicable to this case; and we see nothing in *Newman v. City and County of San Francisco*, 92 Cal. 378, 28 Pac. 569, or in the other cases cited by appellants, that in any way conflicts with them.

Appellants further contend that the decree in *Randall v. Winter et al.* is void on its face, and of no effect, but we fail to see any valid ground for this contention. The court had jurisdiction of the parties and of the subject matter, and its judgment cannot now be attacked collaterally. It follows that the decree and order appealed from must be affirmed, and it is so ordered.

JOHNSON v. GREENBERG et al.

No. 15,375; June 26, 1894.

37 Pac. 141.

Appeal.—Where There is a Substantial Conflict in the Testimony, with sufficient proof to sustain them, the findings of the trial court will not be set aside.

APPEAL from Superior Court, City and County of San Francisco; Eugene R. Garber, Judge.

Action by C. B. Johnson to enjoin Edwin F. O'Neal, as sheriff, from executing a deed to one of defendants, B. Schwartz, and to enjoin defendants Meyer Greenberg and B. Schwartz from further proceedings in the case of defendant Greenberg against defendant California Bituminous Rock Company. Judgment for defendants, and plaintiff appeals. Affirmed.

T. C. Van Ness (Wilcoxon & Bouldin of counsel) for appellant; Reinstein & Eisner, Graves & Graves and E. P. Cole for respondents.

PER CURIAM.—This action was brought to enjoin the defendant Edwin F. O'Neal, as sheriff of the county of San Luis Obispo, from executing or delivering to defendant B. Schwartz a deed to certain land situated in said county of San Luis Obispo, the property of defendant the California Bituminous Rock Company (a corporation), which lands were sold by said sheriff under an execution issued upon a judgment in

favor of defendant Meyer Greenberg against California Bituminous Rock Company, and also to enjoin defendants Greenberg and Schwartz from further proceedings in the action upon which said judgment was rendered. The theory of the amended complaint may be briefly stated as follows: The plaintiff and defendants L. M. Warden and Meyer Greenberg were the owners of the certain lands described in the complaint, the title of which, by common consent, stood in the name of Greenberg, but who held in trust for his co-owners, the plaintiff being the beneficiary as to one-fourth thereof. The corporation defendant was organized by them, and the land conveyed to such corporation. There were twelve hundred and fifty shares of the capital stock of the corporation, of which stock, plaintiff, defendants Warden, Greenberg and Underhill each held three hundred shares, and defendants Graves fifty shares. On January 17, 1891, defendant Greenberg brought suit against the corporation to recover \$8,155.15 for money advanced by him and paid out for the corporation, and on the 7th of March, 1891, obtained judgment. The land in question was sold on the 11th of April, 1891, under an execution issued on such judgment, and purchased by defendant B. Schwartz for the sum of about \$8,155.15. The complainant avers that the corporation defendant was not indebted to Greenberg in the sum of \$8,155.15, or any other sum of money, at the commencement of the suit, and that the action and the sale of the property was a fraudulent scheme on the part of defendants Greenberg and Warden to defraud plaintiff and the other defendants of the property, and that the purchase thereof by Schwartz was for the benefit of Greenberg, and to procure the title for him, and that, thereafter, Greenberg and Warden were to become the owners thereof, to the exclusion of plaintiff and the other defendants; that plaintiff knew nothing of the suit until within a month prior to the commencement of this action; and that the land is of the value of \$50,000. The answer denies all the allegations charging fraud; avers that the defendant corporation was justly indebted to Greenberg; that his claim was a bona fide claim and demand, as plaintiff, who was a director of the corporation, well knew, and that he was well aware of the pendency of Greenberg's action against the corporation within one month after it was brought; and that the value

of the land is not in excess of \$10,000. The written findings fully negative all allegations of fraud, and, in addition thereto, it is found that all the allegations of the answer are true, except that as to the value of the land, which is found to be \$15,000.

Upon the close of the testimony, counsel for the plaintiff asked leave of the court to amend his complaint so as to charge, in substance, that the amount sued for by Greenberg, as due him on account of advances made for the corporation, and in payment of the unpaid balance of the purchase price of the land, was not in fact due him, but that he, the said Greenberg, had in fact borrowed the sum of \$8,155.15 from Schwartz for and on behalf of the corporation defendant, and with the money so borrowed for the corporation had paid off and discharged the obligations of the corporation, all of which was known to defendant Schwartz before and at the time of the sheriff's sale, etc. The court permitted the amendment on condition that the case be opened, and defendants permitted to introduce such further proofs as they might desire. The complaint was amended accordingly, whereupon defendants introduced further testimony.

Formal objections are made to each of the twelve findings of the court, upon the ground that the evidence is insufficient to sustain them. The only question, however, in the case, worthy of consideration, is as to whether the money loaned by defendant Schwartz was so loaned to Greenberg on his own account, or through him to the defendant corporation. Greenberg was secretary of the corporation, and a son in law of defendant Schwartz. That he procured from Schwartz the sum of \$8,155.15, or thereabouts, is well established. The deposition of Schwartz was read in evidence and he was also called as a witness on behalf of plaintiff. His testimony was not at all clear or convincing but may be fairly interpreted as showing that he supposed he was advancing the money to the defendant corporation, or to obtain a mortgage or some lien against the corporation, or to purchase notes of the corporation; and portions of his testimony go to show that he thought he was loaning the money to the corporation defendant. The language used by the witness indicates that he is a German, who speaks our language indifferently; and the testimony, taken as a whole, shows that his understanding

of English is imperfect. He advanced this money, as he thinks, in March or April, 1891. On the other hand, it was conclusively proven that plaintiff and defendants Warden and Greenberg, in 1887, gave their joint and several note to Jack and Goldtree for \$2,937.50, with interest, being for a part of the original purchase price of the land; that the corporation defendant assumed to pay, but did not pay, the note; that Warden and Greenberg paid it by a new note made by them for \$3,191.12, with interest, etc.; that the corporation defendant, engaged in mining and selling bituminous rock from the land in question, met with losses, and that defendants Warden and Greenberg borrowed other moneys at the request of and for the corporation, for which they gave their notes, until in 1890, when the aggregate of the indebtedness of the company for which they were responsible was \$8,000, for which they and one H. Crocker gave their joint and several note for said sum of \$8,000, at thirty days, with interest. Crocker paid the note off at maturity and brought suit against Greenberg and Warden. On the ninth day of January, 1891, Greenberg paid the demand in suit by an overdraft on the First National Bank of San Luis Obispo for \$8,155.15, promising the bank to come to San Francisco, and borrow from Schwartz the money to meet such overdraft. On January 17th he brought this suit, and subsequently procured the money from Schwartz, and paid the overdraft with it. As Greenberg procured judgment March 7, 1891, it may well be that the fact that Greenberg had a lien upon the property was an idea prevalent in the mind of Schwartz when he testified, and which will account for many of the statements that he thought the property good for the investment, etc. But waiving all explanation of his testimony, and the fact still remains that there was a substantial conflict in the testimony, with sufficient proof to sustain each and every finding of the court. The judgment and order appealed from are affirmed.

MATTS et ux. v. BORBA.

No. 15,381; June 26, 1894.

37 Pac. 159.

Slander—Imputing Unchastity.—In an Action for Slander, for calling plaintiff "valhaca," plaintiff and several witnesses (all illiterate Portuguese) testified that the word was in common use among the Portuguese, and meant "whore." Defendant's witnesses, some of whom were educated Portuguese, testified that the term "valhaca" did not mean "unchastity," but that it meant "knave, rogue, crafty," and that the word "puta" was in common use, meaning "whore." Held, sufficient to support a verdict that defendant intended to impute unchastity to plaintiff.

Slander—Evidence.—After Defendant had Examined his witnesses, and rested, plaintiff gave evidence that the word "valhaca" meant "whore." Held, that, if the evidence was improperly admitted, defendant was not prejudiced, there being already sufficient evidence to support the verdict.

Trial—Remarks of Counsel.—It was Agreed That the Cause should be submitted without argument, but plaintiff's attorney said: "I want to make this statement to the jury: That plaintiffs, having commenced this case in the superior court, cannot recover any costs unless they recover \$300 damages." And the court said, "You must not make those statements." Held, that, if defendant thought the court had not sufficiently informed the jury not to consider the remarks, he should have asked for an instruction to that effect, and that a new trial would not be granted on account of such remarks.

APPEAL from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by Frank Matts and wife against Joseph Borba. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Wm. L. Gill for appellant; W. B. Hardy for respondents.

HAYNES, C.—Action for slander. The plaintiffs had judgment, and this appeal is from the judgment and from an order denying defendant's motion for a new trial. The parties plaintiff and defendant are Portuguese, and the slanderous words are charged to have been spoken of and

concerning the plaintiff, Catherine Matts, in the Portuguese language, in the presence and hearing of persons who understood that language, to wit: “‘Valhaca! quando e que es meus homes foram enhar bariga de carne a tua casa.’” Plaintiffs aver that said words signify, and are understood to mean, in the English language, ‘You whore! when my men went and filled their bellies with meat at your house,’ and the said Portuguese words were so understood by the said persons in whose presence and hearing they were spoken; that the defendant meant by said words so spoken to impute to the plaintiff Catherine Matts a want of chastity.” The answer denied speaking the said words, or any of them, or any other words meaning to impute a want of chastity, or that said words, or any of them, signify, or are understood to mean, “‘you whore,’” or “‘whore,’” or were so understood by any person who heard them. Both the plaintiffs and several other witnesses testified to the speaking by defendant of the Portuguese words set out in the complaint, and that the word “‘valhaca’” has the meaning attributed to it in the complaint, some of the witnesses defining it to mean a “‘private whore; that is, a married woman who is doing it on the sly’”; that “‘the word is in common use among the Portuguese to express a woman who has fallen so low as to be common with everyone, even without pay’”; while the defendant and about the same number of witnesses, testified that the words charged were not spoken. All the witnesses in chief on the part of the plaintiff were illiterate, and, with the exception of Mrs. Matts, could not read or write, and she only to a limited extent. The defendant, in addition to the witnesses who were present, and who testified, as positively as witnesses can to a negative fact, that the words were not spoken, called six intelligent Portuguese, two or three of whom had received a collegiate education in Portugal, who testified that “‘‘valhaca’ means ‘knave, rogue, rascal, scamp, scapegrace, crafty, cunning’””; that it never means “‘unchastity’”; that they never heard it used to impute unchastity; that the word in common use, having the meaning of the English word “‘whore,’” is “‘puta’”; and that “‘meretriz” and “‘prostituta” are also used to express the same meaning.

Appellant, in his statement on motion for a new trial, specified as one of the grounds thereof that the evidence was

insufficient to justify the verdict as to the meaning of the words alleged to have been spoken. Respondents contend that this ground cannot be considered, for the reason that it was not included in appellant's notice of intention to move for a new trial. The only clause in the notice which could possibly authorize the specification in question is the following: "Third. Insufficiency of the evidence to justify the decisions and rulings of the court, and that said rulings and decisions are against law." It is difficult to determine what was meant by this statement as a ground of motion for a new trial, nor do I think it necessary to determine it, as it will not affect our conclusions. That there was a conflict in the evidence as to whether the defendant spoke the Portuguese words charged in the complaint is beyond question, even if we add to the evidence upon this point the additional fact that Mrs. Matts, upon a former trial, based upon the occurrences which took place at the time the words are alleged to have been spoken, testified to different language used by defendant, to which she made the same response she now testifies she made to the language stated in the complaint, and in which she applied to defendant's wife the epithet "puta" to express the same meaning that was given by plaintiff's witnesses to the word "valhaca." Similar doubts may be expressed as to the meaning intended to be conveyed by the word "valhaca"; but doubts upon these questions of fact would neither justify the court below in setting aside the verdict of the jury, nor this court in reversing the order denying a new trial. Appellant insists, however, that the testimony of his witnesses as to the meaning of the word "valhaca" leaves no doubt; that, in effect, it is wholly uncontradicted. As to the primary meaning of the word, this is true. Standing alone, as a single word, it does not imply want of chastity, but, like many words in the English language, no definition of which, as found in the dictionaries, refer to chastity, or the want of it, are nevertheless used to imply a want of chastity. There are other words, however, corresponding very closely to the word "valhaca," which, in their ordinary use, do not refer to the subject of chastity, but yet imply qualities which embrace chastity. The word "dishonest," for example, corresponds very nearly, in its primary meaning, to the word "valhaca." The first definition given by Webster is: "Wanting in honesty; void of integrity;

faithless; fraudulent; disposed to deceive or cheat," while the third meaning given is "dishonorable; disgraceful; shameful; wanton; unchaste." So Shakespeare used the word "honest" to denote chastity: "Wives may be merry, and yet honest too." Even the word "occupy" was formerly used to express sexual intercourse, though now never so used. That the word "valhaca" is capable, without greatly distorting some of the definitions given to it, of expressing the imputed meaning, is reasonably clear, and the evidence in this regard is sufficient to support the verdict.

It is also specified by appellant that the court erred in giving the first and second instructions requested by the plaintiffs. It is sufficient to say of these instructions that, if they had been the only instructions given, they were too general to be of much aid to the jury. But the court, in other instructions given of its own motion, fully and very fairly instructed the jury that they must, in order to warrant a verdict against the defendant, not only find that the words charged were spoken by the defendant, but that they have a meaning imputing, and were intended to impute to Mrs. Matts, a want of chastity; that it was not sufficient to find that they were insolent and reviling or opprobrious, but that they had the meaning charged in the complaint; and that, in ascertaining the meaning of the speaker, reference must be had to the words used, and the circumstances under which they were spoken. These and other expressions used by the court must be taken with the more general statements in the instructions excepted to, there being no real inconsistency between them.

Plaintiffs offered in evidence a lease of the land where they resided, and where the alleged slanderous words were spoken. The lease was made to the husband, and had not expired. The difficulty arose from a new tenant going upon the premises with several teams, hauling lumber to erect a barn, one of the teams being driven by defendant, between whom and the plaintiffs ill-feelings existed. Objection was made to the introduction of the lease, and, to the ruling of the court permitting its introduction, defendant excepted. We see no ground upon which it can be said that defendant was prejudiced, even if it be conceded that the evidence was immaterial.

After the defendant had examined his witnesses, and rested, the plaintiffs called several witnesses, who were permitted,

against defendant's objection, to testify that the word "val-haca" meant "whore." The objection was that it was testimony in chief, and not in rebuttal. This evidence might have been properly received in chief, and indeed was of the same character, and given by witnesses having no better qualifications as to learning than those first examined. Appellant contends that the court erred in overruling his objections, no reason being given why they were not called in chief, and cites several cases in support of his contention. These cases were all where the testimony offered in rebuttal was in fact evidence in chief, and was excluded by the court, and the exclusion was sustained upon appeal. In this case, if the evidence offered in rebuttal had been excluded upon the ground urged by appellant, we see no reason why such ruling would not have been affirmed, for the same reason that the action of the court in receiving it should be affirmed. In *Lux v. Haggin*, 69 Cal. 414, 10 Pac. 674, it was said: "All agree that it is within the discretion of the trial court to admit additional evidence in support of the plaintiff's case after the defendant has rested. Of course, it is always safer to admit evidence claimed to be in reply, if the court entertains doubts of its admissibility." Section 2042, Code of Civil Procedure, is as follows: "The order of proof must be regulated by the sound discretion of the court. Ordinarily, the party beginning the case must exhaust his evidence." And subdivision 3 of section 607 provides: "The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case." Defendant's witnesses having testified to the meaning of the word as given in the dictionaries, and its primary meaning as used by educated people, it would have been competent for plaintiffs to rebut by showing that a secondary or corrupted meaning had been given it. If the evidence ostensibly introduced in rebuttal proved not to be properly of that character, the defendant still had recourse to a motion to strike out, when the court, with the evidence before it, could more accurately determine its character. The record does not show the ground upon which it was received; that is, whether it was regarded as properly in rebuttal, or whether the court, in the exercise of its discretion, and in the furtherance of justice, permitted the plaintiffs to strengthen

their case by the admission of original testimony; nor do we think it necessary that it should appear. Upon the point in question there was already sufficient evidence to have supported the verdict, and hence we cannot say that the defendant was prejudiced, or that upon a new trial the evidence given by these witnesses could be disproved.

Upon the conclusion of the evidence, it was agreed that the cause be submitted to the jury without argument; that thereupon the attorney for the plaintiffs arose, and said to the jury: "I do not care to argue this case, but I want to make this statement to the jury: That, plaintiffs having commenced this case in the superior court, they cannot recover any costs unless they recover three hundred dollars damages." Defendant's counsel said: "I object to that statement." The Court: "You must not make those statements." No request was made of the court to instruct the jury to disregard the statement of counsel, nor was any exception taken. The conduct of plaintiffs' counsel in this regard was highly improper, but it was at once met by a prompt and decided rebuke from the court. This the court no doubt considered sufficient to inform the jury that they must not be influenced by it. If defendant thought it not sufficient, he should have requested the court to give such instruction as he deemed proper, and, upon a refusal, to have taken an exception. Conceding that the verdict was for a sum suspiciously near the line (\$305), we cannot say that the improper remarks of counsel in fact influenced the jury. Such irregularities can usually be dealt with by the trial court so as to protect parties against injury, and in proper cases afford relief by granting a new trial. We do not think the court erred in refusing to grant a new trial upon this, nor upon any of the grounds assigned. We advise that the judgment and order appealed from be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

DE HAVEN, J.—I concur in the judgment.

SUTLIFF v. CLUNIE.

No. 15,346; June 26, 1894.

37 Pac. 224.

Assignment for Creditors.—Where an Attorney, Employed by an Assignee to settle claims with the creditors, compromises the claims, giving his own notes in settlement at the rate of fifty cents on the dollar, with the understanding that the estate is to pay them when due, he cannot, on failure of the estate to do so, and after seeing that the estate is in fact solvent, have the claims assigned to a third person, who advanced to him the money to pay the notes, and collect the full amount of the claims for the benefit of such third person.

Assignment for Creditors—Where, in Such Case, the Attorney is the law partner of the assignee, the latter will be chargeable with constructive notice of all the facts in the transaction coming to the knowledge of the former, so as to render him liable for payments in excess of what the attorney paid for the claims.

Assignment for Creditors.—Where an Assignee Employs Counsel to uphold the validity of an unjust claim against the estate, which he paid, he cannot, in case of defeat, charge the estate with the counsel fees.

APPEAL from Superior Court, City and County of San Francisco; C. W. Slack, Judge.

Action by Henry Sutliff against Andrew J. Clunie to compel an accounting by defendant as assignee. From a judgment denying defendant credits for certain items, he appeals. Affirmed.

James G. Maguire and Robt. Y. Hayne for appellant; Ben Morgan for respondent.

PER CURIAM.—In this case defendant appeals from the final judgment, and from an order denying a motion for a new trial. Plaintiff also appeals from the final judgment. The two appeals are presented upon a single record, consisting of the judgment-roll and a bill of exceptions prepared and filed by defendant in support of his motion for a new trial.

Henry Sutliff, the plaintiff herein, was a retail tobaccoist in the city and county of San Francisco. On the first day

of July, 1887, supposing himself to be insolvent, and unable to pay his debts, plaintiff consulted the law firm of Clunie, Young & Clunie, of which the defendant, A. J. Clunie, was a member, and on the advice of Thomas J. Clunie, who was also a member of said law firm, and a brother of the defendant herein, he made and executed to the defendant an assignment of all his property, real and personal, for the benefit of his creditors, which assignment defendant accepted, filed a bond for the faithful performance of his duties as such assignee, upon which bond Thomas J. Clunie was a surety, and thereupon entered upon a discharge of his duties as such assignee. On the twentieth day of July, 1887, plaintiff filed his inventory and schedule of his creditors, etc., as required by section 3461 of the Civil Code, in the office of the county recorder. This action was brought to compel an accounting by the defendant of his transactions as assignee, etc. An account was rendered by the defendant, and the main controversy on this appeal relates to the action of the court below in disallowing portions of two items in the account with which defendant had credited himself. Soon after the assignment, the plaintiff and Thomas J. Clunie, his attorney and friend, conceived the idea of settling with the creditors of plaintiff at fifty cents on the dollar, and with that object in view arranged with Rosenbaum Bros., who held a claim for \$5,558.80, and Joseph Brandenstein, who had a claim for \$9,156.27, to accept fifty cents on the dollar for their claims, to be paid by said Clunie, and the further sum of ten cents on the dollar to be secured by plaintiff's notes, payable when the whole estate was settled. Clunie gave his note to Rosenbaum Bros. for fifty per cent of their claim. Brandenstein was satisfied with the verbal promise of said Thomas J. Clunie. These agreements, the court finds, were made for the benefit of plaintiff, and, as is apparent, with the expectation that he would raise the funds to pay the demands. Defendant professed to have found a man who would advance sufficient funds to pay off all demands due from plaintiff if the latter would pay a bonus therefor of \$2,500. Plaintiff revolted at this, but offered to pay \$2,000, which was rejected. About this time plaintiff discovered that upon a settlement of his estate he would be able to pay all his creditors in full, and so represented to Rosenbaum Bros. and Brandenstein, and requested them to cancel the note and prom-

ise of Thomas J. Clunie, and assured them he would pay them dollar for dollar. They declined to do so. Clunie had taken assignments of these claims against plaintiff to his friends. Before Thomas J. Clunie paid either of the claims, it was arranged between plaintiff, defendant, and Thomas J. Clunie that defendant should deposit with Thomas J. Clunie all the moneys of the estate as realized by defendant, which was done from that time forward. Thomas J. Clunie paid his fifty per cent obligation to Rosenbaum Bros. about July 30, 1887, and the like obligation to Brandenstein on or about August 26, 1887. Up to the date of payment to Brandenstein, Thomas J. Clunie had received and had in his hands funds of the estate, say \$6,000. Subsequently, and by January, 1888, there had come into the hands of said Thomas J. Clunie funds of said estate more than sufficient to pay both of said claims at their face value, viz., \$14,715, and thereupon the defendant authorized him to pay himself from said funds the whole face value of said two claims, which was done, and the amount thereof charged by defendant in his account against the estate of plaintiff. There are some other points bearing upon the case, but it is not deemed necessary to set them out here.

The court below decided the case upon the theory that Thomas J. Clunie was the agent of the defendant in the transaction of the business, and that, as defendant could not, in his fiduciary capacity, make a profit inuring to himself out of the administration of the trust estate, so he could not, by the appointment of an agent, accomplish a result which, as a principal, he was precluded from attaining. Appellant's counsel concede, in effect, that the settlement of the claims below their par value was at the date thereof in the interest of and for the benefit of the plaintiff. Their contention, however, is that plaintiff having failed to raise the money to meet the obligations which Thomas J. Clunie had incurred on his behalf, the latter was at liberty to borrow the money of Turtin to meet his obligations, take an assignment of the claims to Turtin, or for his benefit, and to collect from the assignee the full face value thereof; and hence that the defendant was authorized to make such payment, and to charge plaintiff with the amount thereof. Thomas J. Clunie was a member of the law firm of Clunie, Young & Clunie, and was attorney for plaintiff. He knew, before he took an assignment

in favor of Turtin, that the estate of plaintiff was solvent, and able to pay in full all it owed. Under such circumstances he had no equitable right to purchase demands against his client at a reduced rate, and then charge the latter, or, what is the same thing, his estate, with the par value of the claims. When, under such circumstances, an attorney purchases a claim against his client at less than its face value, he cannot be permitted to make a profit thereby against the principal whose agent he is, and more especially where, as in this case, he has in his custody funds in which the client has a beneficial interest to an amount nearly equal to the amount paid out, with an almost certain prospect of receiving the balance in a short time. Thomas J. Clunie was, it is true, the agent of the assignee, A. J. Clunie, who is defendant here. As such agent he received all the moneys of the estate, and paid its debts so far as they were paid. It is also true that this action is against A. J. Clunie, the assignee. But he was the law partner of Thomas J. Clunie, and as such is chargeable with constructive notice of all facts in relation to the transaction coming to the knowledge of his copartner. It is also quite apparent that he had actual notice of most of the facts, and, whether we treat him simply as a principal authorizing his agent, Thomas J. Clunie, to pay himself in full from the funds of the estate, or as the copartner of Thomas J. Clunie, and hence as the attorney of the plaintiff, seems to make little difference. In either situation he had no right, as against plaintiff, to pay or authorize the payment to Thomas J. Clunie of a greater sum on account of the claims than the amount advanced by the latter on account thereof.

The claim of a counsel fee by defendant was properly denied. The main use which defendant appears to have had for counsel in the proceeding was to contest the two items in question, and, as the decision is against him, he is not entitled to counsel fees for setting up an unjust claim in his own behalf and against the estate.

The appeal by the plaintiff is, so far as appears from the record, without merit. The judgment appealed from by the plaintiff and the defendant and the order appealed from by the defendant are affirmed.

SAVINGS & LOAN SOCIETY v. BURNETT et al.*

No. 14,553; June 27, 1894.

37 Pac. 180.

Trust Deed—Security for Future Advances.—A deed of trust to secure \$20,000, and also all further indebtedness of the grantor to the third party that might be contracted during the continuance of the trust, not exceeding \$35,000, provided that on payment the trustees should reconvey to the grantor, his heirs or assigns, and contained a power of sale on default. Held, that where such grantor afterward made an absolute conveyance to B., and paid the original debt secured, such deed of trust afforded no security for other sums advanced by such third party to the grantor for the purposes stated therein, with actual notice of such conveyance, and that a purchaser at the trustee's sale made on default in payment of such advances held the title in trust for B.

Trust Deed—Quieting Title.—In an Action by Such Purchaser to quiet title, the court found that the grantor was seised in fee originally, that he executed the deed of trust, and that default was made, and the property sold to plaintiff. Held, that such findings did not establish a full fee simple title in plaintiff, where it appeared that such default in payment was of sums not secured by the deed of trust.

Trust Deed—Title of Purchaser.—Even if \$2,000 of the original debt secured was unpaid, a sale of the property regarded by plaintiff as sufficient security for \$35,000 did not give an absolute legal title to the purchaser having knowledge of all the facts.

Quieting Title.—The Complaint in an Action to Quiet Title alleged that the grantor was holding the property against his own deed, and that plaintiff was seised of and holds all the estate, right, title and interest, at law or in equity, which such grantor ever had or could acquire. The answer specifically denied such allegations and alleged the execution of a deed to one B., but asked no affirmative relief. Held, that the pleadings warrant findings and sustain a judgment for defendants.

APPEAL from Superior Court, City and County of San Francisco; John F. Finn, Judge.

Action by the Savings and Loan Society against John M. Burnett and others to quiet title. From a judgment for defendants and from an order denying its motion for a new trial plaintiff appeals. Affirmed.

*For subsequent opinion in bank, see 106 Cal. 514, 39 Pac. 922.

A. N. Drown for appellant; Jarboe & Jarboe and Robt. H. Countryman (Robt. Y. Hayne of counsel) for respondents.

HAYNES, C.—This action was brought by the Savings and Loan Society against Denis Mahoney, John M. Burnett personally, and also as trustee, and the nine children of Mahoney, for the purpose of quieting the title of the plaintiff to certain real estate in the city of San Francisco, and determining the adverse claim of the defendants thereto. The defendants had judgment, and the plaintiff appeals therefrom, and from an order denying its motion for a new trial.

On May 22, 1868, Mahoney, being then the owner of the land in question, borrowed \$20,000 from appellant, and gave his promissory note therefor, and also executed a deed of trust of the premises described in the complaint to E. W. Burr and B. D. Dean to secure said sum, and also "all further indebtedness of the party of the first part to the party of the third part [appellant] that might be contracted during the continuance of the trust, not exceeding \$35,000 at any one time, whether evidenced by promissory notes or otherwise, whether for interest, insurance, or for moneys expended in and about said premises for repairs, taxes, liens, or encumbrances," etc., and provided that upon full payment of all existing and accruing indebtedness the trustees should reconvey to Mahoney, his heirs or assigns. It also contained a power of sale upon default in the repayment of the sum borrowed and the interest thereon, "or in the reimbursement of any amounts herein provided to be paid, or of any interest thereon, and all future advances, disbursements, accounts, balances, and dues"—the power to be executed, on the application of appellant, by sale at public auction, and by conveyance to the purchaser—and further provided that such deed of conveyance, with its recitals of default and notice of sale, should be conclusive proof thereof, "and effectual and conclusive against the party of the first part, his heirs and assigns, and all other persons." On December 28, 1881, the premises in question (the same as described in said deed of trust) were sold thereunder by the trustees in the manner provided, and appellant became the purchaser, its bid being \$17,250 (that being the amount then claimed to be due appellant, and secured by the deed of trust); and on the next day the trustees executed a

deed in due form to appellant, and under this deed it claims title. Respondents answered, taking issue upon appellant's seisin and ownership, and claimed and alleged title to the land in question in John M. Burnett, as trustee under a deed executed to him by said Denis Mahoney on March 6, 1869, declaring certain trusts in favor of Mahoney's nine children, a copy of which deed is attached to the answer. The trusts declared in this deed were "to receive the issues, rents and profits of said premises, and apply the same, or such portion thereof as shall be necessary, for the support, maintenance and education of the nine children of Denis Mahoney," until the youngest of said children should arrive at age; that any surplus profits should be invested, and, when the youngest child should arrive at majority, to convey to them the said lands—each taking an equal undivided interest, and a like interest in the accumulations. It was also provided that no estate should vest in the trustee, directly, contingently, or otherwise, except for the purposes of the trust. Said deed of trust also contained the following clause: "And in case it should become advisable, in the judgment of the said Denis Mahoney and Burnett, to make improvements upon said property, the said trustee is hereby authorized to raise money, by mortgage or otherwise, on said property, or such part thereof as may be necessary for that purpose, and to pay the same, and all charges and interest thereon, out of the rents and profits of the whole of said property, after the application of so much thereof as may be necessary for the support, maintenance and education of said children, in place of investing the said surplus as hereinbefore provided."

The point of the controversy is this: Appellant claims that the amount for which the property was sold to it, under said first deed of trust was due to it for moneys loaned and advances made for taxes, street assessments and other purposes, directly connected with the property, including part of the original loan, and that all these sums, whether loaned or advanced before or after the execution of the trust deed to Burnett, were secured by said first deed of trust, and that, the sale being in all respects regular, the entire title to the premises passed to it by the sale and conveyance thereunder, while respondents claim that the original loan, and the interest thereon, and all advancements made by appellant prior to the

execution of the trust deed to Burnett, were paid and discharged; that the sum for which the property was sold by appellant consisted of loans and advancements made after the conveyance in trust to Burnett, and with knowledge of such conveyance, and therefore were not secured by said first deed of trust; that the sale was therefore without authority and the deed to appellant pursuant to said sale conveyed no title.

The findings state the facts very fully, and, in addition to the general facts above stated, other facts found by the court are essential to a consideration of the points made by appellant. The original loan of \$20,000 was to be paid in seventy-two monthly installments, commencing in September, 1868, and at the date of the trust deed to Burnett, March 6, 1869, the amount of that loan remaining unpaid was \$19,754.49. Appellant paid the taxes on the property covered by the deed of trust for the years 1869-70, 1870-71 and 1871-72, and also a considerable sum for insurance. On May 25, 1871, money was required for repairs and improvements on the property; and, on that day, appellant, at the request of Mahoney and of Burnett, claiming to act as trustee, loaned or advanced \$500 for that purpose, and on March 5, 1872, for some purpose connected with the property and, at the like request, loaned the further sum of \$650. For these sums, respectively, Mahoney and Burnett gave their promissory notes payable at one year—the latter signing the notes as trustee—and in each of these notes it was recited that they were secured by the deed of trust made by Mahoney to Burr and Dean, reciting its date, and where recorded. Prior to the execution of these notes the insurance above mentioned, and the taxes for 1869-70, had been repaid; and on June 11, 1870, all of the original loan had been paid, except the sum of \$2,000. On November 13, 1873, there remained unpaid said balance of \$2,000 and the said two promissory notes above mentioned, together with interest and two years' taxes paid by appellant; and Mahoney and Burnett then desired to obtain the further sum of \$249, with which to pay a street assessment charged upon the property. Upon a statement of these several matters, with accrued interest, it was found that they amounted to \$4,565; and thereupon Mahoney and Burnett—the latter claiming to act as trustee—executed a promissory note for that sum, payable to appellant, at one year,

with interest, and this note also recited that it was secured by said deed of trust made by Mahoney to Burr and Dean; said Burnett signing the note, "John M. Burnett, Trustee of Mahoney Estate." In this connection the court, after finding the indebtedness for which said note was given, and setting out the note in full, proceeded to find as follows: "And that the said note last above referred to was taken and received by the said Savings and Loan Society, as and in payment and satisfaction and extinguishment of all sums of money then due to it by said Denis Mahoney or the said John M. Burnett, and of all claims and demands which it then had against the said Mahoney or the said Burnett, or either of them; and that at the time of the execution of the note last herein referred to the said plaintiff stamped, and marked as paid and canceled, and surrendered up and delivered up to the said Denis Mahoney, the promissory note for the sum of \$20,000, hereinbefore referred to, and marked and entered the same as satisfied and canceled upon the books of record kept by it; and that the note last above referred to was taken in payment and satisfaction of all the sums of money hereinbefore above referred to." After this transaction appellant paid the taxes on the property up to and including the fiscal year 1881-82, and certain insurance on buildings, and also paid several street assessments, at the request of Mahoney and Burnett, which had become liens upon the property in question; and these payments, together with said promissory note of November 13, 1873, for \$4,565, and accrued interest on all said sums, made up the amount of the claim for which said property was sold by the trustees, Burr and Dean, to appellant, after deducting certain payments of interest on said note, which payments were continued to August, 1878. It is also found that the sale of the property was several times postponed, at the request of Mahoney and Burnett, upon payment by them of the cost of publishing the notices of sale.

Appellant's first point is that the findings do not support the judgment, inasmuch as they show that plaintiff was seised in fee of the land at the commencement of the suit. It is not claimed that there is an express finding of title in fee in the plaintiff, but that it is found that Denis Mahoney was seised in fee originally; that he executed the deed of trust to Burr and Dean; that default was made, and the property sold and

conveyed to the plaintiff. And these facts, it is argued, "establish irresistibly and completely an absolute and full fee simple title in appellant at the dates alleged." But this argument assumes either that such title was vested in the trustees, Burr and Dean—that they could, under any and all circumstances, convey a good title—or that a default was in fact made, under which the trustees were authorized to sell and convey. The deed of trust specified the only condition upon which the trustees could sell and convey; and unless that condition existed the sale and conveyance were each void, under section 870 of the Civil Code, which provides: "Where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustees, in contravention of the trust, is absolutely void." By the express terms of the deed of trust, the power to sell depended upon Mahoney's default in the payment of moneys secured thereby, and upon payment they were bound to reconvey to Mahoney. It may be conceded that their deed to appellant vested a *prima facie* title in appellant; but, as this is a suit in equity to quiet title, appellant must have something more than an apparent title. But, in this connection, appellant insists that no title was vested in Burnett by the trust deed to him; that, by the deed of trust to Burr and Dean, Mahoney "emptied himself of his whole estate, and there was nothing left in him to be conveyed to Burnett." The learned counsel is mistaken. There was left in Mahoney the right of possession, carrying with it the rents and profits, and the right, upon payment of his indebtedness to the Savings and Loan Society, to have the entire estate and title as he had held and enjoyed it before; and this right to the possession and use of the property, and the right to have again the unencumbered estate and title upon payment of his debt, he could and did convey to Burnett. Whether the deed of trust to Burr and Dean vested in them the legal title to the land is controverted by respondent; but, assuming that it did, upon payment or satisfaction of the debt thereby secured the trustees had, at the most, the dry legal title, without any interest or ownership in the land. "When the purposes for which an express trust was created cease, the estate of the trustee also ceases": *Id.*, sec. 871. And for that reason, if the purposes of the trust here created had ceased by payment of the debt, the subse-

quent deed of the trustees to appellant conveyed no estate or interest in the land; and whether such payment had been made before such conveyance is therefore a vital question in the case, unless it shall be held that the deed of trust to Burr and Dean was a valid security for all advances made by appellant—as well those made after knowledge of the conveyance to Burnett as of those made before.

1. All the advances made by appellant after the original sum of \$20,000 were optional. The terms of the deed of trust did not require it to make further advances. Assuming that appellant had actual notice of the conveyance to Burnett in trust for the children of Mahoney, it had notice that Mahoney no longer had power to deal with or encumber the property. To the extent the terms of the contract between them, expressed in the deed of trust, required them to make loans or advancements, if any, the Savings and Loan Society might safely go, as any conveyance Mahoney might make would be subject to its requirements. Mahoney not only conveyed all the interest he had in the property to Burnett, but he reserved no power or right over it. It is obvious that those cases cited by counsel as to the rights of a subsequent mortgagee, where advancements have been made by a prior mortgagee after notice of the second mortgage, involve quite different facts, for in those cases the mortgagor remained the owner of the property mortgaged, with full power to create additional liens upon it, so that the question there was not as to the validity of the liens, but as to which had priority. The principles involved are applicable here, however, with even greater force. In such cases the great weight of authority seems to establish the following propositions: (1) A mortgage for obligatory advances is a lien from the date of its execution, and will therefore secure such advances, although other encumbrances are put upon the property before such advances are in fact made, and such advances are not affected by the mortgagee's knowledge of the subsequent encumbrances. (2) But where the mortgagee is not bound to make the advances, and has actual notice of a later encumbrance, such later encumbrance will take precedence of the first mortgage, as to all advances made after such notice. For a discussion of these propositions, see 1 Jones on Mortgages, secs. 369–371, and the numerous cases there cited, and also *Tapia v. Demartini*, 77 Cal. 387, 11 Am. St.

Rep. 288, 19 Pac. 641. If, therefore, Mahoney had mortgaged the property in question to Burnett, and appellant, with actual notice of such mortgage, had made these advances to Mahoney, such advances would have been postponed, and, as to Burnett's mortgage, would have taken the place of a junior mortgage. Much more, then, would an absolute conveyance by Mahoney cut off the lien of future advances to Mahoney which appellant was not obliged to make. If, therefore, the further advances made with actual notice of the deed to Burnett were secured by the deed of trust to Burr and Dean, it must have been because of Burnett's relation to these advancements, or because of the purposes to which the money advanced was applied. It cannot be questioned that both Burnett and the beneficiaries under the deed of trust to him were charged with notice of the deed of trust to Burr and Dean, and of all sums of money loaned or advanced thereunder prior to the date of the deed to Burnett, and that the property was liable therefor, and for all moneys thereafter advanced (if any were advanced) prior to actual notice to appellant of such conveyance. But, after such notice to appellant, the deed of trust, which operated as security for moneys theretofore loaned or advanced, could not be extended to further advances unless Burnett had the power, as trustee, to bind his *cestuis que trustent*, not only for moneys borrowed, but by a security to which he was not a party.

The powers of trustees are thus defined: "A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal": Civ. Code, sec. 2267. The only clause in the deed of trust of Burnett, empowering the trustee to raise money, has been hereinbefore quoted. No reference is made in any manner to the deed of trust to Burr and Dean as a means of securing money for improvements, nor of any reservation of a power in Mahoney to secure further advances thereunder for any purpose; and, as Burnett did not execute a mortgage or other instrument pledging the trust property, a discussion of his power to do so under the terms of the trust deed is not necessary, for if it be conceded that he had the power to procure all these advancements, and

to secure the same by a mortgage with a power of sale, or by a deed of trust such as that in question, which ordinarily creates a strict legal right which may be enforced without the aid of a court of equity, no such legal right was created by Burnett, and the advancements could only be made a charge upon the trust property by the aid of a court of equity. The deed of trust given to secure appellant did not restrict the use of the money loaned to any particular purpose, except as to the payment of taxes, insurance, etc., which the appellant or the trustees were empowered to pay of their own volition; and if, instead of taking the note of November, 1873, for \$4,565, the bank had loaned to Mahoney at that date the difference between that sum and \$35,000, to which the security was limited, and had taken the note for the last-named sum, and this sum had been used by Mahoney for his individual purposes in no way connected with the property, it would hardly be contended that Mahoney or Burnett, or both jointly, could charge the estate of the children with such a liability; and, if not, it is apparent that appellant's claim is based upon an equity arising from the fact that the moneys so advanced were used to relieve the trust estate from liens which endangered the estate of the beneficiaries, and not because of the deed of trust under which appellant claims they were made, and such equity could not be enforced through or under the terms of a dry legal contract to which Burnett was not a party. The sale to appellant, therefore (assuming the facts found by the court to be sustained by the evidence), did not vest in appellant an absolute estate in the land. Burr and Dean were not only trustees for the bank, but were also trustees for Mahoney, and were bound to reconvey to him or his assigns upon the condition expressed in the deed; and unless the facts existed authorizing a sale, appellant took the conveyance subject to the same trust imposed upon them. It is true the deed of trust under which the sale was made contained a provision that the recitals in the deed to be made by them to the purchaser "shall be conclusive proof of such default, and of the due publication of such notice [of sale], and any such deed or deeds, with such recitals therein, shall be effectual and conclusive against said party of the first part, his heirs, assigns, and all other persons." But such recitals could only avail for the protection of an innocent purchaser without notice of any

want of authority in the trustees to sell, and could not be invoked by appellant for its protection. The deed of trust to Burr and Dean was not an absolute deed of trust, but a deed of trust in the nature of a mortgage. The distinction between these instruments is clearly stated in the recent case of *Powell v. Patison*, 100 Cal. 235. 34 Pac. 676, and in *Perry on Trusts*, sec. 602d. Speaking of mortgages with power of sale and deeds of trust, it is said: "At law, both kinds of deeds purport to convey the legal title to the grantee or creditor or trustee; but in equity the land, the title, and deeds stand for security of the debt. The debt is the principal thing, and the conveyance of the land is collateral to the debt. The mortgagor in both cases has an estate in the land, called an 'equity of redemption.' If he fails to pay the debt, his equity of redemption is barred upon due proceedings had; but, if his debt is paid at any time before his equity is defeated by the steps appointed to be taken, it becomes absolute, and he is entitled to a reconveyance, or a discharge of the mortgage, as the case may be." Courts do not favor constructions that confer upon trustees absolute and uncontrollable powers. Burr and Dean were not the absolute owners of the property, but were the donees of a power over it for the benefit of appellant; and, if the debt legally secured by the deed of trust to them had been satisfied before the sale, they could convey no greater interest in the property than was then vested in them, and appellant in such case holds the legal title in trust for respondents.

2. Appellant contends, however, that the finding that the note for \$4,565, dated November 13, 1873, was taken and received by appellant in payment and satisfaction of all claims and demands which it then had against Mahoney or Burnett, or either of them, is not justified by the evidence; that, if said note was not so taken, at least the \$2,000 remaining unpaid of the original loan of \$20,000 was a valid lien upon the property, and sufficient to sustain the validity of the sale by the trustees to appellant. We think the evidence sufficient to support the finding. At the time the note for \$4,565 was given, there was a balance of \$2,000 due upon the original note for \$20,000, for which Mahoney alone was liable. In addition to that, some taxes had been paid by appellant, and two small notes for moneys loaned had been given by Mahoney and Burnett, the latter signing as trustee.

The note for \$4,565 covered the amount of these several items, and the accrued interest, and upon its execution the \$20,000 note was canceled and surrendered; and the note then taken represented the entire claim of appellant at that date, and this note purported to be secured by the deed of trust. There does not appear to have been, in words, any express agreement as to the effect of this transaction in relation to the question of payment. Nothing was said upon that subject. Mr. Burr testified, in substance, that the whole balance was made into one note, instead of having three notes upon which to carry the interest every month, and to that extent the \$4,565 note was made at his instance; that the consolidation was merely to facilitate the bookkeeping of the bank. It is conceded that the mere fact of the acceptance of a note for a pre-existing debt does not extinguish it, or that one simple executory contract does not extinguish another for which it is substituted, unless such be the agreement of the parties. Whether such was the agreement of the parties is a question of fact, which the court, in the absence of a jury, was required to determine: *Griffith v. Grogan*, 12 Cal. 324. In *Brown v. Dunckel*, 46 Mich. 32, 8 N. W. 537, it was said: "The giving of a note for the debt did not, as a matter of law, operate as a payment of the debt, unless it was so expressly agreed; but it should be understood to be so expressly agreed if the jury could ascertain from the facts and circumstances that it was so mutually understood between the parties." In *Stanley v. McElrath*, 86 Cal. 455, 10 L. R. A. 545, 25 Pac. 16, it was said: "The payment of money is not necessary to the extinguishment of an obligation. A debt may be paid by the giving of a note, if it be offered and accepted as payment." The facts that, as to the balance of the \$20,000 note, a new party was added as a joint maker; that the old note was surrendered; that there was not at any time an offer to return the new note, nor any demand for the redelivery of the former; that the new note was set down in the statement of the items comprising the sum for which the property was sold as constituting part of the appellant's claim; that the new note, upon its face, purported to be secured by the deed of trust, which provided for securing other sums besides the \$20,000 note—tend strongly to show such understanding. The giving of a new note is at least a conditional payment, and suspends the first

obligation until the maturity of the new note, when the creditor may suspend or cancel the new obligation, and proceed upon the original: *Brewster v. Bours*, 8 Cal. 506. "When suit is brought against a defendant upon a debt, whether evidenced by a note or otherwise, and it appears that he has given a bill or note for the same debt, which has become mature and is unpaid, while it does not operate as a bar to the suit, it is essential to the plaintiff's recovery that it be produced and surrendered up, or otherwise satisfactorily accounted for at the trial. This is necessary as a safeguard to the defendant, for, if the plaintiff should have passed it off before maturity to a third party, the defendant might be compelled to pay the debt a second time": 2 *Daniel on Negotiable Instruments*, sec. 1275. See, also, *Burdick v. Green*, 15 Johns. (N. Y.) 247; *Rayburn v. Day*, 27 Ill. 47; *Morrison v. Welty*, 18 Md. 176. We think there is such evidence as forbids us to set aside the finding that the new note was given and received in payment of the balance due upon the original note. But, even if it were otherwise, we think a sale of the whole property, which was regarded by appellant as sufficient security for \$35,000, should not be held to give an absolute legal title to a purchaser having knowledge of all the facts, but that, in such case, appellant, by the purchase, became a trustee, and held no other or better title than that held by Burr and Dean.

3. Appellant further excepts to the findings, in that it is there said that Burnett "claimed to act as trustee," while appellant contends that the evidence shows that he "did act as trustee." What Burnett did, and how he did it, are fully set out in the findings. Whether these acts were the authorized and valid acts of a trustee is a conclusion of law. That he "claimed to act as trustee" is the finding of a pure matter of fact.

4. The finding that the \$20,000 note was canceled upon appellant's books is amply sustained by the evidence. Mr. Burr testified that the new note was taken to simplify or facilitate the bookkeeping of the bank, as the monthly interest would be computed upon one note, instead of three. The plain inference is that the account of the \$20,000 note was balanced, closed or canceled. If it had not been closed, the books of the bank would have shown the debt to be \$2,000 more than is

claimed. Besides, no mention is made of any balance of that account in the statement under which the property was sold.

5. E. W. Burr, a witness on behalf of the plaintiff, was asked by counsel for the plaintiff the following question: "To what extent, if at all, was it the intention of the bank, or of yourself acting for the bank, at the time of taking this \$4.565 note, to receive it in extinguishment or satisfaction of the existing obligation or indebtedness?" An objection was sustained, and the same question, varied somewhat in form, was several times repeated, and objections sustained to each. It is not necessary to consider whether the court erred in these rulings, since the final question of the series was not objected to, and in response to that, as well as in the testimony of the same witness to preceding questions, the witness stated all that could be properly said upon the subject, even to including the "purpose" for which, as well as the circumstances under which, it was taken.

6. The finding that appellant had full knowledge of the deed to Burnett from and after the time it was recorded is sustained by the evidence. It is clear that on May 25, 1871, appellant required Burnett, as trustee, to sign the \$500 note. Some small amounts had been advanced for taxes and insurance; but these sums were all repaid prior to the making of this note, except the taxes for 1870-71, amounting to \$415.37, which was included in the note of November 13, 1873, which the court found was received in payment of all sums then unpaid. While there is no direct evidence of actual knowledge or notice of the Burnett deed prior to May 25, 1871, there was evidence tending to show that such actual notice was obtained from the record presumably at or about the date at which the deed was recorded.

7. The objection that the pleadings do not warrant the findings nor sustain the judgment is not maintainable. The complaint alleged that Denis Mahoney was holding the same against his own deed, and "that plaintiff is seised of, and now holds, all the estate, right, title and interest, at law or in equity, which said Denis Mahoney ever had, or could at any time acquire, of, in or to said real property, or any part of the same," and that defendants wrongfully claim, etc. The answer specifically denied all these allegations, and alleged the execution of the trust deed to Burnett. No affirmative relief

was prayed for by defendants and none was given. The issue was upon the title of the plaintiff—whether, as against the defendants, it had such title as would authorize a decree in its favor—and the judgment was upon that issue.

The conclusions reached have not been arrived at without difficulty. It has been impossible to notice in detail the very extended and able arguments of counsel or to close our eyes to the hardships of appellant's situation. Whether any relief may yet be obtained has not been considered, and any language used which might be construed as an intimation upon that point must be disregarded. I think the judgment and order appealed from should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

MILLBRAE CO. v. TAYLOR et al.

No. 15,039; June 27, 1894.

37 Pac. 235.

Trade Name—Injunction.—Defendant, the Owner of Land Known as "Millbrae Station," formed a copartnership with plaintiffs to keep cows on said land, and sell the milk therefrom under the trade name of "Millbrae Dairy." Afterward the partnership was dissolved, plaintiffs taking the milk routes and business of selling milk, and defendant, who remained the owner of the land, agreeing to supply them with milk therefrom. Later plaintiffs terminated the contract with defendant, and took no more of his milk, but still conducted a milk business under the name of the "Millbrae Dairy," and formed a corporation under the name of the "Millbrae Company," to carry on the business. Held, that plaintiffs could not ask for an injunction to restrain defendant from using the name "Millbrae" in a competing business, since their own use of the name was a fraud on the public.

APPEAL from Superior Court, City and County of San Francisco; Wm. T. Wallace, Judge.

Action by the Millbrae Company against H. H. Taylor and others to enjoin the use of a trade name and for damages. Judgment for defendants. Plaintiff appeals. Affirmed.

Wheaton, Kalloch & Kierce for appellant; Maxwell & McEnerney for respondents.

HAYNES, C.—Action to enjoin the defendants from using a “trade name,” which it is alleged belongs to the plaintiff (a corporation), and for damages. Findings and judgment were against the plaintiff, and this appeal is taken from the judgment and an order denying its motion for a new trial. An outline of the facts, condensed from the findings, may be thus stated: Some time prior to 1865, the defendant D. O. Mills became and still is the owner of a tract of land in San Mateo county, at the railroad station now, and ever since 1865, known as Millbrae station. From 1865 until August, 1883, A. F. Green and defendant Mills were copartners, engaged in the business of raising and keeping cows of superior quality and breed upon said land, and selling the milk therefrom in the city of San Francisco, said business being conducted, at least since 1875, under the trade name of “Millbrae Dairy”; the word “Millbrae” being compounded of the name of the owner of the ranch (omitting the “s”) and the Scotch word “brae.” In August, 1883, F. H. Green purchased a one-third interest in the cows and other personal property and business, and the firm as thus constituted continued the business until September 1, 1886, under the same trade name. At the date last named the copartnership was dissolved by mutual consent and in the settlement A. F. and F. H. Green took the milk routes and business of selling the milk in San Francisco, with the wagons, horses and appurtenances, and defendant Mills, who was at all times the sole owner of the land, took all the dairy implements, supplies, cows and other personal property at the ranch, and on the same day entered into an agreement with said A. F. and F. H. Green whereby he agreed to sell to them and they agreed to buy, not less than two hundred and seventy nor more than three hundred and ninety gallons of milk per day, at a price therein specified, the milk to be thus furnished by defendant Mills to be exclusively from his own dairy, and this agreement was to continue for at least one year.

A similar agreement was made each year, the last being dated September 1, 1889, the quantity named therein being not less than three hundred and sixty and not exceeding four hundred and ten gallons per day. This contract stipulated that it should be in force for at least one year, and thereafter until one of the parties should give the other three months' notice of his intention to terminate it. About July 1, 1890, A. F. and F. H. Green organized a corporation under the name of the Millbrae Company (the plaintiff herein), and conveyed to it their said business, property and goodwill, they being the principal stockholders therein, and practically owning and carrying on said business through said corporation, and on the 1st of August, 1890, ceased to take milk from defendant Mills under said contract, and thereafter the plaintiff procured from Marin county the milk with which it supplied its customers. Until the formation of the corporation, the business continued to be conducted by A. F. and F. H. Green under the name of the "Millbrae Dairy," and their delivery wagons were so marked, and that name was printed upon their bills and receipts, upon which it was also stated that the milk was "produced on Millbrae farm, San Mateo county." After the organization of the corporation, the name on the wagons and bills was changed to "Millbrae Company," and on the bills it was stated simply "pure country milk, produced from rich pasture, wholesome feed, healthy cows"; without any indication as to the locality except the word "country." On September 1, 1890, the defendant D. O. Mills commenced the business of selling milk from his said dairy in the city of San Francisco, and engaged defendant Taylor as agent for that purpose, and employed defendant Cole to manage the sale and distribution of the milk in the city; and in this business adopted and used upon his wagons and upon his bills the original trade name, "Millbrae Dairy," but specified upon his bills and advertisements that the milk sold was from the Millbrae dairy, in San Mateo county, and added: "Do not confound it with the Millbrae Company." At the time of the dissolution of the copartnership, a valuation was put upon all the property, and among other items of the city branch of the business, which was taken by A. F. and F. H. Green, was "100 cans' trade, \$4,000."

The foregoing facts are not disputed, and are sufficient to present the principal question in the case. There are several specifications of the insufficiency of the evidence to justify certain findings, but these can be more briefly disposed of after deciding the principal question, since if the findings excepted to were framed as appellant suggests they would not change the result. It is insisted by appellant that the "trade name" is a part of the goodwill sold by defendant Mills to Green & Green, and for which they paid a large sum of money; that such name is an important element in such goodwill, and that plaintiff has the exclusive right to its use. Appellant is in error as to the facts to which he applies the law, and hence is wrong as to his conclusions. The findings upon this subject are not only supported, but are made clear, by the testimony of F. H. Green, who was one of the parties to the contract under which it is claimed the goodwill of the business and the right to use the trade name was sold by defendant Mills. He said: "Prior to that time [referring to his purchase of an interest in 1883] the business had been carried on by D. O. Mills and my father, under the name of the 'Millbrae Dairy.' I think they gave it the name of the Millbrae dairy in 1875 or 1876. In 1883 the business was in the name of the Millbrae dairy. I continued in business with them some three years. In 1886 we entered into an agreement to divide the business up. Mr. Mills took the interest in the country, and my father and myself took the interest here. Since that time my father and myself conducted the business under the name of the Millbrae dairy." It will also be observed that on the day of the dissolution of the partnership the contract was entered into for the sale by Mills to the Greens of the milk produced at Millbrae, and by which the Greens agreed to sell the same in San Francisco, and that defendant Mills has ever since continued the business of keeping cows and producing milk at the same place and under the same name. There was nothing said in the contract about the sale or transfer of the goodwill, or of the use of the name under which the business had been conducted. It was not a sale of the entire business with which the name was connected, but a "division" of the business, and the name was equally applicable and equally important to each part. So long as the Greens or their successors continued to sell Mill-

brae milk, there was no conflict of interest in the use of the name, nor was there any agreement, covenant, or obligation that the Greens should have the right to use it longer than they continued to sell Millbrae milk. On the contrary, the fair and reasonable implication was that the name should only be used in connection with the sale of milk produced by the owner of the ranch and dairy familiarly known by that name, and which name was even more important to be retained by the owner of the ranch than by one whose right to sell the milk depended upon a yearly contract. Nor was this contract terminated by defendant Mills, but plaintiff, for its own advantage, voluntarily terminated it by a three-months' notice, under the terms of the contract, and now insists that it may deprive defendant Mills of all use and benefit of the well-established name in disposing of his milk, while using the false name of "Millbrae" for selling the milk of a competing producer.

It is not necessary to review the cases cited by appellant, for the question involved is no longer an open one. In the case of *Joseph v. Macowsky*, 96 Cal. 521, 19 L. R. A. 53, 31 Pac. 914, it was said: "A person who comes into a court of equity for an injunction in a case of this kind must come with clean hands. He cannot be granted relief upon a claim to the exclusive use of a trademark which contains a false representation, calculated to deceive the public as to the manufacturer of the article and the place where it is manufactured: *Browne on Trademarks*, secs. 71, 474; *Palmer v. Harris*, 60 Pa. 156, 100 Am. Dec. 557; *Fetridge v. Wells*, 13 How. Pr. (N. Y.) 385; *Hobbs v. Francais*, 19 How. Pr. (N. Y.) 571; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. Ed. 706, 2 Sup. Ct. Rep. 436. In *Siegert v. Abbott*, 61 Md. 284, 48 Am. Rep. 101, the court said: 'It is a general rule of law in cases of this kind that courts of equity will not interfere by injunction where there is any lack of truth in the plaintiff's case; that is, where there is any misrepresentation in his trademark or labels.' " If, at the time the partnership was dissolved, D. O. Mills had sold to his copartners the ranch and dairy, as well as his interest in the business of selling the milk there produced, the property in the trade name and the exclusive right to use it would have passed to the purchasers, and Mills could not have applied the name to another ranch

or dairy and used it in the like business to the injury of the plaintiff. By the division of the partnership property and business, coupled with the contracts for the sale of the same milk, the Greens acquired the right to use the trade name so long as they sold Millbrae milk; but they could not rightfully use it after they ceased to sell that milk, without wronging both Mills and the public. It does not aid the plaintiff's case that Marin county milk, which it now sells, is as good or even better than Millbrae milk. As was said in a similar case, "the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce": Prince Mfg. Co. v. Prince's Metallic Paint Co., 135 N. Y. 24, 17 L. R. A. 129, 31 N. E. 993. For a full discussion of the questions principally involved in the case at bar, see the case last above cited, and, also, Pepper v. Labrot, 8 Fed. 29, and Huwer v. Dannenhoffer, 82 N. Y. 499. In Atlantic Milling Co. v. Robinson, 20 Fed. 217, it was held that the right to the symbol is inseparable from the right to make and sell the commodity which it has been appropriated to designate. Pierce v. Guittard, 68 Cal. 68, 58 Am. Rep. 1, 8 Pac. 645, is entirely consistent with Joseph v. Macowsky, supra, and is against appellant.

It is claimed that the second finding is, in effect, that defendant Mills first used and adopted the name "Millbrae" before his partnership with A. F. Green, and that this is not justified by the evidence. Whether this name was adopted before or after is wholly immaterial. It had certainly been used many years before the dissolution, and was well known. It was the name of a locality, and attached thereto, no matter by whom nor when it was originated. Whether Millbrae farm is or is not shown by the evidence to be "peculiarly" fitted and adapted to the purpose of producing milk, or that it is not shown to produce better milk than other farms or dairies, is also immaterial. The name used to indicate milk produced on that farm had become valuable, and the question here is not one of comparison with other milk or other ranches, but whether defendant Mills shall be deprived of the use of a name that is valuable to him. The finding that "D. O. Mills never sold nor conveyed to A. F. Green and F. H. Green nor to either of them, the goodwill of the business of selling milk in the city of San Francisco," is, I think, supported by the evidence. The evidence shows that at the time of the dissolu-

tion of the copartnership four milk routes were operated. Those routes were not defined in the evidence. There was no agreement that Mills should not engage in that business in the city. Whatever might be said of the "routes" then operated, there is nothing in the evidence to indicate that he intended to exclude himself from the business of selling milk in the city, unless during the continuance of his contracts with his former partners. Besides, so far as the use of the trade name is concerned, the goodwill of the milk routes is an immaterial factor. It was found by the court that Green & Green "were to take from D. O. Mills all the milk which might be necessary to carry on the said business"; and this, it is said, is not justified by the evidence. The agreement, as we have seen, specified a minimum and maximum quantity, and, while they did not contract not to buy or sell other milk, and the evidence shows that they sometimes did so, yet the finding is substantially true. It was a division of the business, and during the continuance of these contracts they advertised no other milk, and there is no evidence tending to show that it was not usually sufficient to supply their customers. The finding that the use of the word "Millbrae" was a representation to the public that the milk sold was produced at Millbrae farm or dairy is incontrovertibly supported by the evidence, as is also the finding that the use of the same word by the plaintiff after it ceased to sell Millbrae milk was a false representation. The assurance given by plaintiff to its customers that it was selling them Marin county milk could not have been necessary if the use of the word "Millbrae" did not imply that it was selling milk from Millbrae dairy.

It was further alleged in the complaint that defendants Taylor and Mills entered into a scheme which had for its object the going into the business of selling milk in said city, and of obtaining customers by enticing away the customers of the plaintiff; that in pursuance thereof they induced the defendant Cole, who had been in the employment of the plaintiff and its predecessors for fifteen years, and had full knowledge of their milk routes, to leave the plaintiff and enter into their service, and were thus able to impose upon the customers of the plaintiff and sell them milk while such customers believed they were purchasing from plaintiff; that defendants' wagons closely resembled plaintiff's, and had painted on them

the words "Millbrae Dairy," and were run under the personal charge of defendant Cole, and by these means, and particularly by using the name "Millbrae," and having the same painted upon their wagons, and having them in charge of defendant Cole, have been drawing away plaintiff's customers, and allege damages in the sum of \$500. Upon these issues the court found that no scheme was entered into; that none of plaintiff's customers were imposed upon, or bought milk from defendants when they supposed they were buying from plaintiff; that the wagons used by defendants do not resemble plaintiff's wagons; that none of plaintiff's customers have been drawn away, except by fair and open competition; that none of said customers were misled by the defendants' use of the trade name "Millbrae," and that plaintiff has not sustained any damage. Appellant claims that none of these findings are supported by the evidence. That defendants sold milk to a very considerable number of the former customers of plaintiff is not disputed. Whether defendants obtained these customers by improper means is a mixed question of law and fact; the means used being a question of fact, but whether such means were improper is a question of law, depending upon the relation of the parties, and their rights and duties toward each other. There is no doubt that plaintiff has sustained loss by the competition of defendants, but whether such loss is a legal injury, entitling the plaintiff to recover damages, is quite another question. The use of the trade name, so long used by plaintiff and its predecessors, must necessarily aid the defendants in securing custom, but, having the right to use it, plaintiff cannot complain. The circulars used by defendants for advertising their business were headed "Millbrae Dairy, of Millbrae, San Mateo County," and informed the people that they would sell their own milk, and further said, "Do not confound it with the Millbrae Company." We think these findings are fully justified by the evidence, notwithstanding the evidence shows that plaintiff suffered loss in consequence of what defendants did. Some of these findings, taken by themselves, are mixed conclusions of law and fact, and necessarily so. But they must be read in connection with the other findings, showing the relations of the parties and their rights and duties toward each other. Appellant contends that "a person who sells the goodwill of a busi-

ness will be enjoined from again setting up business at such a place and in such a manner as to destroy or diminish the business of which he had sold the goodwill; that the sole issue is between D. O. Mills, the vendor of the goodwill of a business, and appellant, successor to his vendees." We think that the only goodwill that was sold by Mills was the goodwill of the routes then operated for the sale of Millbrae milk; that it was not the intention of Mills to shut himself out from them, nor from any part of the city, if his vendees should cease to sell his milk. His vendees might have exacted other conditions, but they did not do so. In the language of F. H. Green, it was a "division of the business" theretofore carried on by the so-called vendor and vendees as partners, and that business was the sale of Millbrae milk. Mills did not sell the goodwill of the business of selling any other milk, as no other milk was sold, and his vendees could not divert the place where that business was conducted to the sale of a competing article, and shield themselves from his competition by claiming that the goodwill continued, not only as to the place, but as to the place used for selling a different and competing article. This conclusion makes it unnecessary to consider the cases cited by appellant in support of the proposition that the vendor of the goodwill of a business "must do nothing to impair or injure it" (a proposition which certainly requires material qualifications), or those other cases which undertake to specify with more or less particularity what the vendor who again enters upon a similar business may or may not do in furtherance of it.

I think the evidence justifies the findings and that the judgment and order appealed from should be affirmed.

We concur: Temple, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

MACOMBER v. CONRADT et al.

No. 15,259; July 20, 1894.

37 Pac. 382.

Appeal.—Where a Surety on an Appeal Bond Disposes of his property pending the appeal, the court cannot require appellant to file a new bond in the absence of a statute authorizing it to do so.

APPEAL from Superior Court, City and County of San Francisco; Wm. T. Wallace, Judge.

Appeal by Julius Conradt and another from a judgment in favor of C. A. Macomber. Motion by respondent to require appellants to file a new appeal bond. Motion denied.

John H. Durst for appellants; Henley & Swift, Henley & McSherry and S. V. Costello for respondent.

PER CURIAM.—Respondent recovered a money judgment against appellants in the superior court, and the case is pending before this court upon appeal. He now makes a motion to this court wherein he prays that an order be made requiring the appellants to forthwith file a new bond upon appeal herein, with sufficient sureties for the payment of the judgment in the above-entitled action, and that such sureties qualify before a justice of this honorable court, and in default of the filing of such bond, or in default of the sureties upon such bond to justify as may be ordered by this court, that this appeal be dismissed. In support of this motion, he filed an affidavit, the material portion of which is to the effect that Maria Conradt, one of the sureties upon the aforesaid bond and undertaking, had disposed of all her property since she qualified thereon, and that, in consequence thereof, said security had become wholly insufficient and inadequate as a guaranty for the payment of the judgment, together with costs, appealed from. No statute has been called to our attention which authorizes us in making the order here prayed for, and we know of none. For this reason the motion and application is denied.

GRAY v. LONG et al.

No. 18,237; July 26, 1894.

37 Pac. 380.

Sale—Diseased Trees.—Plaintiff Sold to Defendant certain trees. It was provided that, on account of a disease with which the trees were affected, a certain percentage should be excepted. Defendant selected the trees and they were shipped to him in another county. On account of an ordinance of the county to which the trees were shipped, adopted after the sale, defendant was prohibited from planting therein any of the trees which were diseased, and returned the same to plaintiff, who refused to receive them. Held, that plaintiff could recover for all of the trees selected by and shipped to defendant.

Sale—Diseased Trees.—The Fact That an Ordinance of a county to which trees are shipped prohibits the planting of any diseased trees therein does not invalidate a sale of trees as to any diseased ones included therein, where the sale was made in another county before the ordinance was adopted.

APPEAL from Superior Court, Fresno County; M. K. Harris, Judge.

Action by H. P. Gray against one Long and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Frank H. Short for appellants; George E. Church for respondent.

HARRISON, J.—The plaintiff and the appellants made the following agreement at Armona, in the county of Tulare, December 2, 1891:

“This is to certify that I have this day sold Long Bros. & Co., of Fresno county, California, all my budded one year old nursery stock, amounting in all to about 25,000 trees, except what I wish for my own use, to the amount of 5,000 trees, more or less, assorted, and 10 per cent. deduction for black knot; trees to be f. o. b. cars at Armona, Cal., at the rate per tree of 14 cents, amounting to about \$2,494.80, on which I acknowledge the receipt of \$500; stock to be delivered

by the 1st of January, 1892. Long Bros. & Co. agree to be on the ground to examine and accept the stock.

• "H. P. GRAY.

"LONG BROS. & CO."

On or about the 1st of January, 1892, the defendants went to the nursery of the plaintiff at Armona, and examined the stock of trees covered by the agreement, and, after such examination, accepted fifteen thousand and fifty-eight of them, and the same were thereupon shipped by railroad to the defendants at Fresno. After the trees had been received at Fresno one of the members of the county board of horticultural commissioners of Fresno county examined them, and, finding that many of them were affected with black knot, notified the defendants that the trees could not be planted in that county, and, under his directions, the defendants shipped back to the plaintiff, six thousand one hundred and fifty-three of the trees. The plaintiff refused to recognize the right of the defendants to return the trees, and the defendants refused to pay for them; whereupon this action was brought to recover the amount due for all the trees that had been accepted by the defendants at the price named in the contract. Judgment was rendered in favor of the plaintiff, and the defendants have appealed.

By the terms of the contract between the parties, the plaintiff sold to the defendants his entire stock of one year old trees, reserving the right to retain about five thousand for his own use. It was understood by them that some of the trees would be affected with black knot, and they thereupon agreed that a deduction on that account to the extent of ten per cent of the entire amount should be made from the stock which was sold. The contract does not provide that the trees which might be affected with black knot shall not be embraced in the sale, but that all of the trees are sold save such as were reserved for the plaintiff's use, and that a deduction of ten per cent shall be made on that account, whether the number of trees so affected should amount to that quantity or not. The price per tree was fixed upon this estimate, and whether the affected trees exceeded or fell below the estimate cannot change the amount which the defendants agreed to pay. This is not only the natural construction to be given to the words of the agreement, but it is the construction which the defend-

ants themselves placed upon it when they accepted the trees. Instead of objecting to all the trees that were affected with the black knot, after those so affected had been sorted out from the others, they culled these over, and took their choice of them, in order that only ten per cent of the stock might remain, and accepted them in fulfillment of the contract. After the contract had been made, the county of Fresno passed an ordinance, to take effect December 30, 1891, requiring an inspection of all fruit trees that should thereafter be brought into the county, and directing the destruction or removal from the county of such as should be found to be affected with any live scale or insect pests injurious thereto. It was under the provisions of this ordinance that the defendants were directed to return to the plaintiff a portion of the trees, as above stated; and it is now urged by them that they are not liable, therefore, for such trees, upon the ground that the contract for their purchase was in violation of this ordinance. The contract, however, was not made within the county of Fresno. By its terms the sale was made, and the trees were to be delivered in pursuance thereof, within the county of Tulare; and it is not contended that there was any ordinance of the county of Tulare by which such contract would be affected. Moreover, at the time the contract was entered into, the ordinance had not been adopted in the county of Fresno. For these reasons, this contention of the appellants cannot be maintained. The judgment and order are affirmed.

We concur: Garoutte, J.; Van Fleet, J.

LUCE et al. v. SAN DIEGO LAND & TOWN CO.

No. 19,375; July 26, 1894.

37 Pac. 390.

Master and Servant—Contract of Employment.—Plaintiffs, by letter, offered their services to defendant for \$5,000 a year. Defendant replied that plaintiffs' "names shall appear on the pay-roll at the rate of \$416.66 per month." Later, defendant's president in-

quired if the salary was satisfactory, and plaintiffs replied that they did not know whether they were employed by the month or year; that they would accept no employment except by the year, to which defendant's president consented. Held, that the employment was by the year, at \$5,000, payable monthly.¹

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action by M. A. Luce and another against the San Diego Land & Town Company for a balance due on salary. Judgment for plaintiffs, and defendant appeals. Affirmed.

Works & Works for appellant; E. W. Britt for respondent.

GAROUTTE, J.—This is an action to recover the sum of \$4,166.68, alleged to be the balance due on the annual salary of respondents as the attorneys of appellant, from the first day of March, 1892, up to and including the last day of February, 1893, with interest thereon. On the first day of March, 1889, the law firm of Luce, McDonald & Torrance, which up to that time had been acting as the attorneys of appellant, at a salary of \$83.33 per month, wrote a letter to the land and town company, appellant, explaining the condition of the corporation's legal affairs at that time, and asserting that for some time thereafter an extra amount of labor would devolve upon them as attorneys of the company, by reason of important cases then pending. Among other matters this letter contained the following statement: "We have, as before stated, given the matter very careful consideration, and have concluded that, until these important matters in litigation are disposed of, an annual salary of \$5,000 is the least sum for

¹ Cited along with many other cases, to show the various aspects in which the question has been viewed, in *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 5, 85 N. E. 879, whereupon the court goes on to say: "Without reviewing the cases or analyzing the principles to determine which is the soundest view, it is enough to say that the use of the sum of money equivalent to a year's pay, in describing the amount which the plaintiff was to receive, was a proper circumstance for consideration in connection with other incidents. The length of the term of service reasonably inferable as the understanding of the parties, from their words, course of dealing and other acts, was a fact to be determined upon all the evidence."

which we ought to take upon ourselves the labor and responsibilities incident to continuing our position as general attorneys for the company in this county and state." In due course, the plaintiffs, in reply, received from the president of the defendant a letter containing, among other matters, the following: "In view of the coming litigation, and the trial of the causes which are enumerated by Judge McDonald, I think that their statement that their present compensation is not adequate is correct. . . . I note, however, the suggestion of our attorneys that they shall receive on and after March 1st compensation at the rate of \$5,000 per annum; the same, I suppose, to be payable monthly, in conformity to the precedent hitherto. I think this is carrying our legal expenses rather beyond the limit which we ought to incur, especially as many of the cases enumerated may never come to trial. This is not a matter, however, in which we can afford to resort to dickering. You may therefore inform Messrs. Luce, McDonald & Torrance that on and after March 1st, until a change shall be made, their names shall appear on the pay-roll at the rate of \$416.66 per month." Within a few days subsequent to the receipt by plaintiffs of this letter, William G. Dickinson, general manager of the defendant (appellant), held a conversation with plaintiffs, wherein the following occurred, as appears by the uncontradicted testimony of the plaintiff McDonald: "Colonel Dickinson inquired if we had received his letter in regard to our proposition for salary. I informed him that we had. He then inquired if the proposition was satisfactory. Judge Torrance replied that we didn't know exactly whether it was satisfactory or not. Colonel Dickinson replied by inquiring wherein it was unsatisfactory. Judge Torrance replied that 'we had made a proposition for a yearly employment, and that the letter which we had received in reply stated that we would be placed on the pay-roll at the rate of \$416.66 per month,' and that he (Torrance) 'didn't know whether the company meant by that to employ us by the month, or whether it had accepted our proposition for a yearly employment.' Colonel Dickinson replied: 'Why, Judge McDonald knows how that is. He has been on the pay-roll before, and knows that we always pay by the month. In his case he has been receiving a thousand dollars a year, divided into twelve monthly payments of \$83.33 a month.'

Judge Torrance replied: 'Well, there might possibly be some contention with regard to the terms of the employment, and we would under no circumstances accept an employment other than by the year.' Colonel Dickinson replied: 'We would no more employ you by the month than you would be employed by it; for we are no more anxious to have you leave us in the lurch at some time in the future, or jump your salary on us—raise it again—than you are willing that we should have the right of discharging you at any day that we saw fit.' Judge Torrance said: 'Well, we are perfectly willing, as stated in our letter, to be employed by the year at five thousand dollars per annum. But,' he said, 'I think the proper construction of the two letters means a yearly employment, and nothing else, but I didn't want to leave it in any doubt. I want it distinctly understood that the employment is by the year.' Colonel Dickinson replied: 'If it is a monthly payment that you object to, we will pay you by the year, if you want to be paid that way instead of by the month. But,' he said, 'we have always been paying by the month, and I supposed that would be more agreeable to you.' Both Judge Torrance and myself stated that it would be more agreeable to us to be paid in monthly installments than any other way. Colonel Dickinson then made some reference to the business of the National City and Otay Railway Company. We told him that that was perfectly satisfactory; that we would attend to the business of the National City and Otay Railway Company, and all other matters or interests in which the land and town company was interested, for the salary of five thousand dollars a year. He said it was all right." The case was tried by the court, without a jury, and the only contention at the trial was as to whether plaintiffs' employment by the defendant was by the year, at an annual salary of \$5,000, payable in monthly installments of \$416.66; and the findings were in favor of such contention. This appeal is prosecuted from the judgment and order denying a motion for a new trial, and it is now insisted that the evidence is insufficient to support these findings of fact made by the court.

There is no substantial conflict in the evidence, and we have quoted the important and controlling portions of it. Viewing this evidence from any standpoint, we think the case before us a very simple one. Plaintiffs, by letter, offered their

services to defendant at an annual salary of \$5,000. If defendant's letter be construed as constituting an acceptance of the offer, then plaintiffs' cause of action is complete, and the judgment is right. If defendant's letter does not constitute an acceptance of plaintiffs' offer, then the two letters, taken together, do not constitute a binding contract, and no recovery to any extent could be based thereon. It cannot be successfully urged that defendant's letter was an offer to hire plaintiffs by the month, and that plaintiffs accepted such offer and rendered services thereunder; for they at all times asserted to Dickinson, the general manager of defendant, that they would not enter into a contract of that character. Again, if the letters did not constitute a contract of hiring by the year, they constituted no contract at all, for certainly the minds of the contracting parties never met upon any other terms and conditions. If these letters constituted no contract, then a contract for employment by the year was entered into with plaintiffs by the general manager of the defendant corporation. That the general manager of a corporation doing business in California (its president and directors living in a distant state) had the right to make the contract here sued upon is too clear to demand the citation of authority. It is thus apparent from any aspect of the case that plaintiffs are entitled to recover. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: Harrison, J.; Van Fleet, J.

KELLER v. FINK.

No. 19,356; July 26, 1894.

37 Pac. 411.

Water Rights—Injury to Dam.—Where plaintiff had the right to the water of a ditch and to a dam on defendant's land, which the latter used for the purpose of pasturing stock, defendant was not liable for injuries to the dam by the cattle tramping and treading the same, where plaintiff had the right to enter and protect the dam against such injuries.

APPEAL from Superior Court, San Luis Obispo County; V. A. Gregg, Judge.

Action by Frederick Keller against Charles Fink for damages to a dam. Judgment for defendant and plaintiff appeals. Affirmed.

Graves & Graves for appellant; W. H. Spencer for respondent.

HAYNES, C.—Plaintiff is the lessee of the Branch Flouring-mill, operated by the waters of Arroyo Grande creek. The dam and a portion of the ditch which conveys the water from the dam to the mill are upon defendant's land. It is claimed that defendant's horses, cattle and hogs so injure the dam and ditch that plaintiff is deprived of water to run his mill for a considerable portion of the time, and prays judgment for the sum of \$5,000. The answer denies all the allegations of the complaint, and, for a second defense, alleges that he uses his land for stock purposes in the usual manner, and that he has never, in any manner, intentionally injured, or permitted to be injured, said dam or ditch. The cause was tried before a jury, and a general verdict was returned for defendant, upon which judgment was entered, and this appeal is from the judgment and an order denying plaintiff's motion for a new trial.

Respondent makes the point that the appeal from the order cannot be considered because not taken in time. This objection must be sustained. A bill of exceptions was taken by plaintiff, and used on the hearing of the motion for a new trial. The only errors of law noticed in appellant's brief are that the court erred in refusing to give the third and the fourth instructions requested by plaintiff. There was no controversy as to the right of the plaintiff to maintain and use the dam and ditch. The question was as to the defendant's liability for casual injury thereto upon his lands, occasioned by his stock, which was kept upon his land in the manner in which such stock is usually kept, and which rightfully had access to the water. The third instruction, if it had been given, would have required the jury to find against the defendant if they found that he permitted his stock to injure the dam and ditch "by tramping and treading and cutting the same," whereby the water was prevented from flowing to plaintiff's

mill. It was not contended that defendant had not the right to the water for his stock, nor, on the other hand, was there any denial of plaintiff's right to enter to make repairs, nor does it appear that plaintiff could not, without interfering with defendant's rights, have protected his dam and ditch, or that the dam might not have been so constructed and of such material that the stock could not injure it, instead of the temporary structure composed of brush and sand which existed. The fourth instruction requested was to the effect that, under the condition of things stated in the third request, the plaintiff was entitled to damages. These instructions were properly refused, and the instructions given fairly stated the law applicable to the facts developed by the evidence.

The plaintiff was not prejudiced by not being permitted to answer the question, "You say the profits have been \$8 per day?" inasmuch as he did not make a case entitling him to any damages. An objection was properly sustained to the following question: "State whether or not it was worth while to repair the ditch so long as the defendant's stock are permitted to roam and go over the same." Unless it was shown that it was the defendant's duty to protect the dam and ditch, or in some manner prevent his stock from injuring them, the question was immaterial, and we see nothing in the evidence imposing such duty upon the defendant. Plaintiff's objection to the question put to defendant, "Have you used this land of yours, which includes the creek, any different from the way you have used your other land?" was properly overruled. No one has the right to purposely or so negligently use his property as to imply a willingness to injure the property of another, or which creates an injury which would not result from its ordinary and lawful use, but each is bound to protect his property from such injury as may arise from the ordinary and lawful use by another of his own property. We see no ground upon which the judgment should be reversed, and advise that it be affirmed.

We concur: Searls, C.; Vanelief, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the appeal from the order denying a new trial is dismissed and the judgment affirmed.

Ex Parte MURPHY.

No. 21,146; August 4, 1894.

37 Pac. 468.

Habeas Corpus—Expiration of Sentence—Escapes.—When in habeas corpus the sheriff returns that he holds the prisoner by virtue of a commitment to the house of correction for three years, and the commitment bears a date more than three years old, the court cannot consider an unauthenticated statement of dates when the prisoner escaped and was recaptured, and of the date when his term will end, the same being pinned to the sheriff's return, as proof that the prisoner has not in fact served his term.

Habeas corpus ex parte Thomas Murphy. Petitioner discharged.

G. E. Colwell for petitioner.

PER CURIAM.—The petitioner was convicted of grand larceny in the superior court of the city and county of San Francisco, March 1, 1889, and on March 9, 1889, was sentenced to be confined in the house of correction of said city and county for the term of three years. Upon his petition and averment that he is illegally restrained of his liberty by the sheriff of said city and county, a writ of habeas corpus was issued out of this court, directed to said sheriff, and to the said writ the sheriff made return that he holds the petitioner by virtue of a commitment issued under the aforesaid judgment, said commitment consisting of a certified copy of the judgment. As the commitment bears date March 9, 1889, it appears upon its face that the period of confinement for which the petitioner was sentenced has expired, and, as the sheriff presents no other authority for restraining him of his liberty, it follows that he is entitled to be discharged. It was suggested at the first hearing of the matter that the petitioner had in the meantime escaped from the house of correction, and that he had not in fact been confined for the full period of his sentence. Thereupon leave was given to the sheriff to amend his return, for the purpose of showing these facts, but he has failed to make such showing, and again returns that

he holds him by virtue of the original commitment. There is attached, by a pin, to the amended return filed by the sheriff, what purports to be a list of dates at which the petitioner escaped, and was recaptured, and the statement of the time when his term of confinement will expire. This list or statement is signed "Chas. Gildea, Supt.," but is not authenticated in any other mode, nor is it in any way referred to by the sheriff, and cannot be considered as giving to that officer any authority to retain the petitioner in his custody. The petitioner is discharged.

ONTARIO LAND & IMP. CO. v. HOWARD.

No. 19,336; August 15, 1894.

37 Pac. 465.

Appeal—Conflicting Evidence.—A Judgment for plaintiff will not be disturbed where there is a substantial conflict in the evidence, with a clear preponderance in plaintiff's favor.

APPEAL from Superior Court, San Bernardino County; John L. Campbell, Judge.

Action by the Ontario Land & Improvement Company against J. S. Howard to compel defendant to pay a balance due on a contract for the sale of land, or, in default thereof, to foreclose his interest in the land. From a judgment for plaintiff and from an order denying a new trial defendant appeals. Affirmed.

Goodecell & Leonard and E. H. Jolliffe for appellant; Sheldon & Borden and E. M. Hanna for respondent.

SEARLS, C.—On the ninth day of June, 1887, H. L. Macneil and others, as trustees, entered into an agreement in writing with H. C. Parker, by which they agreed to sell to him, and he agreed to buy, a certain piece or parcel of land situate in Ontario, county of San Bernardino, state of Cali-

fornia, designated as "Lot number one (1) in Canyon Ridge Tract of Ontario Colony," together with ten shares of the capital stock of the San Antonio Water Company, for the sum of \$2,500, payable in four annual installments of \$625 each—one on the execution of the agreement, and the residue in like annual installments—with interest, etc.; said Parker to have possession and deed to be executed on completion of payments. Plaintiff is assignee of Macneil and others, and defendant Howard is assignee of Parker, and agreed to pay purchase money to plaintiff. This action was brought to obtain a decree requiring the defendant to pay a residue of such purchase money within a specified time, or, in default thereof, that his interest in the land be foreclosed. Defendant pleaded want of title in plaintiff.

At the trial it was stipulated, in substance, that a patent from the government of the United States had issued for the rancho Cucamonga, and that plaintiff held under the grantee in said patent. The only question under the stipulation was whether or not the land agreed to be conveyed was within the exterior boundaries of the rancho Cucamonga, as defined in said patent. It was conceded that, if the tract was within the patent, plaintiff had title thereto in fee simple, and was able to convey, and had tendered a good and sufficient deed of conveyance, properly executed, to defendant, which he had refused to accept, or to pay any portion of the money due as the purchase price of the land. The cause was tried by the court, a jury having been waived, written findings filed in favor of plaintiff, upon which a judgment was entered in its favor. The appeal is by defendant, J. S. Howard, from the judgment, and from an order denying a motion on his behalf for a new trial.

The case is plain and simple. Plaintiff, by its testimony, made what may be termed a perfect case; showing, beyond a peradventure, the land to be within the exterior boundaries of the rancho Cucamonga. Defendant introduced testimony tending to show that said land was without the boundaries of the rancho. Taken together, there is a substantial conflict in the evidence, with, as I think, a clear preponderance in favor of plaintiff. Under such circumstances, there being no other question involved, it can subserve no useful purpose

to analyze and discuss the testimony. The judgment and order appealed from should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed,

QUILL v. JACOBY et al.

No. 19,330; August 18, 1894.

37 Pac. 524.

Vendor and Vendee.—In an Action to Rescind a Contract for the sale of land, which provided that the grantor was to build a levee along a river, whether the levee was completed within a reasonable time is a question for the court sitting as a jury; and, in the absence of any proof of damages to the grantee from failure to complete the same, a finding that it was completed within a reasonable time will not be disturbed, though the work was not completed for four years.¹

Vendor and Vendee — Construction of Contract — Levee.—Where a contract for the conveyance of land facing on a street provides that a levee shall be constructed on the “west side of the said tract,” which side faces a street, the construction of the levee in the center of the street is a compliance with the provision.

APPEAL from Superior Court, Los Angeles County; W. H. Clark, Judge.

Action by James Quill against A. Jacoby and another. There was a judgment for defendants, and plaintiff appeals. Affirmed.

¹ Cited and followed in *Spaeth v. Ocean Park etc. Investment Co.*, 16 Cal. App. 332, 116 Pac. 981, where, no time having been fixed in the contract for demand to be made, it was left to the jury to determine from all the circumstances if the demand had been made within a reasonable time.

Cited and followed in *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 657, 67 Pac. 1088, where also the question was left to the jury, to be determined on all the evidence, whether construction had been completed within a reasonable time.

M. C. Hester for appellant; Graff & Latham for respondents.

SEARLS, C.—On the thirteenth day of July, 1887, James Quill, the plaintiff and appellant herein, entered into two written contracts with A. Jacoby and L. Thorn, the defendants and respondents, by each of which the plaintiff agreed to purchase, and the defendants to sell and convey, a specified lot in the “Jacoby and Thorn Subdivision,” in the city of Los Angeles. For one lot appellant was to pay \$800—\$300 down and the remainder in two equal payments of \$250 each, at six and twelve months, respectively. For the other lot he was to pay \$700 in three equal installments—one at the date of the execution of the contract and the others at six and twelve months, respectively. One of the lots was designated as “Lot 4” and the other as “Lot 3,” both in block L of said tract. The deferred payments were to bear ten per cent interest per annum. The contracts were identical in date and form, except as to description of lots and the amounts of payment. Respondents were to convey the lots to appellant upon payment of the final installment of the purchase price. The contract contained the following further stipulation: That respondents would “construct and build a levee along the west side of said tract, in accordance with the plans and specifications as furnished by the council of the city of Los Angeles, and, if the last payment hereinbefore provided for should grow due before said levee has been accepted by the city as completed, then the last payment above referred to shall be deferred until said levee has been accepted by the proper officers of Los Angeles city, but shall be immediately due and payable on the acceptance of said work by the authorities of the city of Los Angeles.” The agreement further provided that completion of the levee at an earlier date should not cause the last payment to become due before the expiration of the year from the date of the agreement as therein specified. Appellant made the payments, except the last, which was postponed until January 6, 1891, by reason of the nonconstruction of the levee, at which last-mentioned date appellant served upon respondents a written offer to relinquish and transfer to them all his interest in the lots under the contract,

and demanded a repayment of the money by him paid on account of the contracts, specifying the sums so paid, which being refused, this action was brought to recover the money thus paid, aggregating \$1,107 and interest.

Defendants in their original answer admitted the levee was not constructed; averred that a reasonable time for the construction thereof had not elapsed; averred that it was impracticable to construct such levee until its continuation above and along Los Angeles river was built; averred their willingness to construct it as soon as the connections could be made; averred a contract between the city of Los Angeles and a railroad company, by which the latter was engaged in building the whole of the levee in question, including that along the west side of the lots. The answer also denied an offer to rescind, retransfer, etc. By a supplemental answer defendants averred the completion and acceptance of the levee on or before April 11, 1892. The cause was tried by the court without the intervention of a jury, and written findings filed, upon which judgment was entered in favor of the defendants for costs. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The eighth finding of the court, which involves the main question in the case, is as follows: "That the levee along the west side of said tract, in accordance with the plans and specifications as furnished by the council of the city of Los Angeles, is fully completed, and was in process of completion prior to the first day of January, 1891; and the commencement of the construction of said levee and the completion thereof were within a reasonable time after the making of said contract by and between the plaintiff and defendants." The objections made to this finding are: (1) That the evidence shows that no levee has ever been made along the west side of the tract mentioned in the contracts; (2) that the evidence and pleadings show that prior to January 6, 1891, no levee had been commenced along the west side of said tract; (3) that the evidence shows that nearly four years elapsed after contract made before completion of levee, and that it could have been built in three months. It appears from the evidence that the land agreed to be conveyed to plaintiff lies on the east side of the Los Angeles river, fronting upon a street or boulevard of, say, one hundred feet in width, run-

ning between it and the river; that a levee in front of lot 3, in block L (lot 4 being in the rear of lot 3, and not fronting on the boulevard), would be of no avail to keep out the water of the river unless continued up the river, say, one mile; that about the time of the execution of the agreement a plan was devised for the construction of the levee by property owners in interest, and a contract was let for the work, under which a levee was constructed from the upper end to within about three thousand feet of this tract, when the work ceased from the difficulty in getting timber and lumber. Defendants afterward sought to obtain the necessary timber and lumber, but failed to do so. They subsequently agreed with the Los Angeles Terminal Railway Company that the latter should construct the embankment or levee, and have and use it as a roadbed for its railway. The embankment is from eight to ten feet high. The exact time of its construction in front of plaintiff's lot only appears inferentially from the testimony of H. F. Stafford, as engineer and a witness for plaintiff, who says that on the 24th of September, 1891, he "made a survey of the land and of the levee that has been constructed by the Terminal Railroad along that portion of the subdivision showing blocks . . . and L, as the same is delineated on the map." It was therefore constructed prior to September 24, 1891. It will be observed that the agreement specified no time within which the levee was to be built. If constructed within the year, it did not hasten the date of the last payment for the land; but, if not constructed and accepted within the year, the effect of the delay was to defer such last payment until the levee was completed and accepted by the city of Los Angeles. What was a reasonable time for the construction of the levee (conceding that question to be involved) depended largely upon the magnitude and character of the work to be performed, and all the surrounding circumstances. The facts entering into the question were peculiarly within the province of a jury, or the court sitting as such, and in the absence of any allegation or proof of advantages which would have accrued to appellant by an earlier construction of the levee, or of damage to him by the delay, we are not prepared to say that the finding of the court is contrary to the evidence. Non constat but that the fact that the last payment was deferred

until the levee was completed may have fully compensated appellant for the delay.

The objection that the finding that the levee was "in process of completion prior to the date of the rescission of the contract by appellant" is contrary to the admission of the answer, and the evidence is technically correct. The answer admits that defendants had not commenced the construction of the levee, but avers that the railroad company had commenced building it on the tenth day of November, 1890, and had been continuously engaged thereat up to the time of answer, all of which it averred was well known to plaintiff, and in the supplemental answer they aver its completion. No part of it in front of the lots in question had been constructed up to January, 1891. The further objection that no part of the levee was ever constructed "along the west side of said tract" is without merit. Appellant contends that it should have been along the west line of the "boulevard," whereas in fact it was in front of lot 3, and on or near the center of the boulevard. Lot 3, as indicated on the map referred to in the agreement, lies on the east side of, and fronts on, the boulevard. We may indulge the presumption that a conveyance of the lot will include the fee to the middle of the street, but know of no presumption under which it can be made to include the whole of the street. The embankment, being at this point apparently in the middle of the boulevard, must be on or near the line. The object of the levee was no doubt to protect the land from overflow from the river, and there is no suggestion that it is not efficacious to that result. The question whether or not the boulevard includes a portion of the river is one not raised by the pleadings, and, if raised, could cut no figure in the determination of the question involved here, for the reason that the failure of title, if any, is not of any land agreed to be conveyed. Upon the facts as found by the court, the conclusions of law are correct. Indeed, it may well be doubted whether, assuming the facts to be as stated in the complaint, a case is made under which plaintiff was authorized to rescind the contract. "Where the failure be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed," a rescission cannot be had: *Parsons on Contracts*, 8th ed., p. 679. In *Franklin v. Miller*, 4 Adol.

& E. 599, Littledale, J., says: "It is a clearly recognized principle that if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to." It would seem that, when the parties stipulated that the last payment upon the land should be deferred until the levee was constructed, they agreed upon the consequences which should follow a failure to construct the levee, and that in such a case, there having been no time specified within which it was to be constructed, the delay should not, unless greatly extended, give a right to a rescission. The judgment and order appealed from should be affirmed.

We concur: Temple, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

ULLRICH v. SANTA ROSA NAT. BANK.

No. 15,624; August 20, 1894.

37 Pac. 500.

Parties.—In an Action to Recover Money Deposited by plaintiff with defendant under an agreement that it is to be paid to a third person on condition that the latter deliver a deed to plaintiff within a certain time, such person is not a necessary party.

Appeal—Presumption.—Where, on Appeal, the Record Does not Contain the evidence, and findings of fact were waived, it will be presumed that the allegations of the complaint were proven, and that the affirmative allegations in the answer were not.

APPEAL from Superior Court, Sonoma County.

Action by one Ullrich against the Santa Rosa National Bank. There was a judgment for plaintiff and defendant appeals. Affirmed.

R. M. Swain and J. A. Barham for appellant; Albert G. Burnett and J. M. Thompson for respondent.

HARRISON, J.—It is alleged in the complaint that on the 9th of December, 1892, the plaintiff deposited with the defendant the sum of \$750, and that at the same time it was agreed between him and one Hattie C. Brown that she would, within three weeks from that time, “furnish” the plaintiff with a deed of conveyance of certain land in Sonoma county, and that thereupon the defendant should pay her the money so deposited, and that if she should fail to so furnish the deed the defendant should return the money to the plaintiff; that said money was accepted by the defendant upon and subject to this condition and agreement; that Mrs. Brown has entirely failed to furnish the deed; that on the 26th of September, 1893, the plaintiff demanded of the defendant the return of the money, which was refused; and that the defendant, at the time of such demand, knew that Mrs. Brown had failed to furnish the deed. Judgment was asked against the defendant for the amount so deposited with it. The defendant demurred to the complaint upon the ground that there was a defect of parties defendant, in that Mrs. Brown was a necessary party to the suit. The demurrer was overruled, and the defendant answered the complaint, denying all its allegations, and setting up certain affirmative matters of defense. The cause was tried by the court without a jury. Findings of fact were waived, and judgment was rendered for the plaintiff, as prayed in his complaint. The defendant has appealed from the judgment upon the judgment-roll alone, without any bill of exceptions.

1. The demurrer was properly overruled. The complaint does not show that Mrs. Brown was in any way interested in the matter in litigation, or that her presence was necessary to a determination of the rights of the plaintiff and defendant to the money in controversy. The allegations of the complaint are to the effect that the money had been received by the defendant from the plaintiff upon the condition and agreement that, if Mrs. Brown did not furnish to the plaintiff a certain deed within three weeks from the date of the deposit, the money was to be returned to the plaintiff, and that she had not furnished such deed. This is but the ordinary averment of an agreement for the payment of money upon the happening of an event, and that the event had happened. If these

averments are true, the defendant is liable to the plaintiff for the money.

2. If there were any facts, not appearing upon the face of the complaint, which would render Mrs. Brown a necessary party, whose presence was essential to the determination of the controversy, those facts could have been presented by the defendant in its answer; and the court would thereupon, upon its motion, have ordered her to be brought in as a defendant: Code Civ. Proc., sec. 389. So, too, if Mrs. Brown had set up any claim to the money held by the defendant, the defendant could have alleged that fact in its answer; and if it could have shown the facts required by section 386, Code of Civil Procedure, it could, under the provisions of that section, have had her substituted as a defendant in its place, and procured a discharge from any liability for the money. Defendant did not, however, pursue either of these courses, but chose to defend its right to retain the money by a mere traverse of the allegations of the complaint.

3. As the record does not contain any of the evidence at the trial, and as findings of fact were waived, we must assume, in support of the judgment, that the allegations of the complaint were sustained by the proofs, and that the affirmative allegations of the answer were not so sustained. The judgment is affirmed.

We concur: Garoutte, J.; Van Fleet, J.

PACIFIC COAST RAILWAY COMPANY v. RAMAGE,
Tax Collector.

No. 19,343; September 1, 1894.

37 Pac. 532.

Double Taxation.—When a Railroad Company, Empowered by charter to build its road between termini in different counties, lays its tracks at one terminus on a wharf, and the whole railroad is assessed by the state board of equalization, pursuant to constitution, article 13, section 10, providing that the roadbed, rails and rolling

stock of all railroads operated in more than one county shall be assessed by that board, an assessment of the wharf by the county tax collector does not constitute double taxation, since the wharf is not a necessary part of the railroad, and brings in a separate income.

APPEAL from Superior Court, San Luis Obispo County;
V. A. Gregg, Judge.

Action by the Pacific Coast Railway Company against George W. Ramage, tax collector, to set aside an assessment. Judgment for defendant. Plaintiff appeals. Affirmed.

Wilcoxon & Bouldin and J. M. Wilcoxon for appellant; F. A. Dorn for respondent.

TEMPLE, C.—This appeal is from the judgment and upon the judgment-roll. The complaint shows that plaintiff, a corporation, is engaged in operating a steam railway between Los Olivos, in Santa Barbara county, and Port Harford, in San Luis Obispo county. The defendant is the tax collector of San Luis Obispo county. During the fiscal year of 1892-93, plaintiff was, and still is, the owner of a railway in San Luis Obispo county, thirty-nine and five-tenths miles, and no more, of which nine miles, and no more, were in Santa Fe school district, in said county, which said nine miles the state board of equalization assessed for that year at \$46,123.47, and no more, which taxes were paid by plaintiff. That the county assessor, in addition, arbitrarily and without authority, assessed a portion of the railroad so assessed by said state board of equalization at the sum of \$6,000, upon which a tax is levied of \$79.25, which is claimed to constitute a lien upon said property. There is a proper averment as to the threat of the tax collector to sell the property for the tax, and that the invalidity of the tax does not appear from the face of the assessment, and a prayer for an injunction. The answer consists of denials. The findings are as follows:

“This cause came on regularly for trial before the court on the twenty-fourth day of July, 1893, upon the complaint of plaintiff and the answer of defendant, both parties being represented by counsel. Evidence was introduced by both parties, and the cause submitted for decision, and the court

now finds the facts of said case to be as follows: That in the year 1874, by an act of the legislature of the state of California, entitled 'An act to provide for the construction of a railroad from the bay of San Luis Obispo, in the county of San Luis Obispo, to Santa Maria, in the county of Santa Barbara,' approved March 27, 1874 (Stats. 1873-74, p. 695), John M. Price, Juan V. Avila, N. Goldtree, H. M. Newhall, John O'Farrell, F. S. Wensinger, Charles Goodall, and Christopher Nelson, or their successors or assigns, were chartered and did construct a railroad extending from the town of Santa Maria to the bay of San Luis Obispo, and extended to what was then known as the 'People's Wharf,' on said bay. That prior to the year 1874 one John Harford constructed a wharf on said bay, at a point about one mile northwest of said wharf, known as the 'People's Wharf.' That plaintiff is now, and at all the times set forth in the complaint herein was, a corporation formed and existing under and by virtue of the laws of the state of California, for the purpose of, and was and is engaged in, operating a steam railway between Los Olivos in Santa Barbara county, and Port Harford, in San Luis Obispo county. That on the — day of —, 1874, this plaintiff succeeded to the interest of said John Harford in and to said wharf built by him, and also to the interest of John M. Price, Juan V. Avila, N. Goldtree, H. M. Newhall, John O'Farrell, F. S. Wensinger, Charles Goodall, and Christopher Nelson, and their successors and assigns, in and to said railroad, and then extended said railroad about one mile to the Harford wharf, and from time to time, prior to the year 1890, extended said Harford wharf into the bay of San Luis Obispo, beyond low-water mark; and ever since the year 1890 the said wharf has been of the following dimensions, to wit: Commencing at the hotel, a point below low-water mark, the wharf is 16 feet wide for 452 feet, at which point it commences at 22 feet, and runs to 78 feet broad for 416 feet. It then tapers from 78 feet to 56 feet for 256 feet, and is 56 feet broad for 144 feet, at the end of which distance it broadens from 56 feet to 108 feet for 288 feet, and from which distance it is 108 feet broad to its far end, 320 feet, making a total length of 1,876 feet. That said plaintiff, prior to the year 1890, built upon and there has ever since been on the outer end of said wharf belonging to plaintiff a building as follows: A large one-story

building, 60 feet broad by 228 feet long, within which is located the depot of said company, railroad office, telegraph office, station-house, and waiting-rooms, in a room 18x22 feet in size. That plaintiff maintains upon said wharf its line of track, and two double switches extended to the extreme end of said wharf, for the purpose of receiving and discharging freight and passengers carried by water, and said track and switches are a portion of its main line of track. Said double switches are located on both sides of said building. That defendant is now the duly elected, qualified and acting tax collector of San Luis Obispo county. That, for the fiscal year 1892-93, plaintiff was, and is now, the owner of a line of railway as above set forth, which measured a distance, counting from the water end of said wharf or structure to where the same crosses the line between San Luis Obispo and Santa Barbara counties, of thirty-nine and five-tenths miles, all of which was in the first-named county, which was duly assessed for taxation by the state board of equalization, and apportioned by said board to San Luis Obispo county during said fiscal year. That thereafter, and during the time for assessment of property by county assessors, the assessor of San Luis Obispo county regularly assessed and added to the assessment of plaintiff for said year the following items: Franchise granted by the board of supervisors, \$500; furniture, \$250; safe and scales, \$500; machinery and tools, \$1,500; 3 wagons, \$75; 1 A. horse, \$75; 273,000 feet of lumber, \$5,460; 100 cords of wood, \$400; other personal property, not described, \$500; wharf and warehouse at Port Harford, \$6,000. That all taxes assessed as aforesaid for said fiscal year upon all of said assessments have been paid by plaintiff, except a tax of \$75, levied upon 'wharf and warehouse at Port Harford, valued at \$6,000,' which with costs, percentages, etc., now amounts to the sum of \$79.25, which is claimed to constitute a lien on the property of plaintiff. That plaintiff owns no wharf or warehouse at Port Harford other than the one hereinbefore described, and did not own any such during said fiscal year. That said sum of \$79.25 has not been paid by plaintiff because it claimed that the same was illegal and a double assessment. That defendant, as tax collector, as aforesaid, has advertised the said property last above mentioned for sale, to satisfy said last-named sum, and threatens to sell the same

therefor. That, under and by virtue of the following clause in a license ordinance of the board of supervisors of said San Luis Obispo county, plaintiff pays a license tax to said county of \$25 per quarter, and did so during the whole of said fiscal year. The clause is as follows: 'Every person, association, or corporation engaged in the business of conducting or carrying on a bridge, ferry, wharf, chute, or pier, for the accommodation of the public or others, for hire, whose average yearly receipts therefrom exceed \$10,000, shall pay a license tax in the sum of \$25 per quarter.' That plaintiff during said fiscal year did conduct a wharf as hereinbefore described, for hire, and its receipts therefrom for wharfage exceeded \$10,000." Conclusions of law: "In my opinion, said wharf and building thereon was legally assessed by the county assessor, not being the class of property assessable by the state board of equalization, under section 10, article 13, of the constitution: See *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, 30 L. Ed. 118, 6 Sup. Ct. Rep. 1132. The plaintiff claims that the property is assessed double, because the number of miles of road assessed by state board in the county will, as measured on the ground, include distance enough to extend the road assessment to end of wharf. I assume, as a conclusion of law, that the mileage assessed by state board was based upon data returned by plaintiff to that board for assessment, Let judgment enter for defendant for his costs. Plaintiff will take nothing by this action."

The contention of the appellant is that the assessment of the wharf by the county assessor is double taxation; that the same was properly assessed by the state board; that the length of the wharf is included in the mileage of railroad assessed by the state board; and that, the railway having been built upon the wharf, it constitutes the "roadbed," which the state board was to assess: Const., art. 13, sec. 10. It is also contended that, inasmuch as the assessment includes the roadbed, the assessment is void, although it were conceded that the wharf and warehouse are something more than a mere roadbed or roadway, because the unlawful part cannot be separated from that which is lawful: *California v. Central Pac. R. Co.*, 127 U. S. 1, 32 L. Ed. 150, 8 Sup. Ct. Rep. 1073. The invalidity of the assessment, if any, does not appear upon the face thereof. The presumption is that it is valid. Has the plain-

tiff shown its invalidity? I think not. The wharf is a structure in navigable waters of the state. It could not be lawfully constructed without the grant of authority in some form from the state. The incorporation of the plaintiff did not necessarily confer upon plaintiff that right. The points between which they are authorized to construct and operate a railway are not shown further than that they are operating such a road between Port Harford and Los Olivos. Port Harford is somewhat indefinite. The wharf was constructed by a private individual, presumably under lawful authority, and apparently the wharf was purchased by plaintiff after the construction of the railway built by plaintiff's predecessors. Under such circumstances, the fact that plaintiff has since extended its track over the wharf does not necessarily imply that it rightfully did so as a part of the railway that it was authorized by its charter to build and operate. The wharf, in its nature, is not necessarily a part of a railway. This wharf pays a large income as a wharf. Had it remained the property of Harford, and the railroad been constructed upon it, the presumption would have been that the track was for the convenient use of the wharf, as well as of the railway, and it would not have constituted a part of the railway for purposes of taxation. I do not think the findings show that it does now. In the case of *City of San Francisco v. Central Pac. R. Co.*, 63 Cal. 467, 49 Am. Rep. 98, it appeared that the ferry was a part of the line of the railroad as described in its articles, and it was claimed that the ferry-boat upon which the tracks were laid constituted a portion of its roadbed, but it was held otherwise. Here it is not made to appear that the wharf constitutes any part of the line of the road. The fact that the mileage assessed by the state board would include the length of the wharf is immaterial. That was undoubtedly as it was given in by plaintiff. But whatever length they gave in it could not extend beyond the two termini which are required to be fixed in their articles. I think the judgment should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

GOETZ v. GOLDBAUM.

No. 19,331; September 1, 1894.

37 Pac. 646.

Agency—Pleading.—A Complaint on a Contract Executed by an agent may, without more, aver its execution by defendant, the principal; and, the agency appearing from the copy of the note set out, authority to execute it is implied, and need not be expressly alleged.¹

Agency—Ratification.—Ratification Need not be Expressly pleaded.

Agency—Estoppel.—W., a Merchant, and Partner with plaintiff in a livery, failed, and transferred his property to his brother S., through whom he settled with most of his creditors, as he swore, with his own money. Business was done in S.'s name, but W. borrowed money from plaintiff for the business, bought out his interest in the stable, and gave him a note for the whole, signed, "S., per W." Plaintiff asked S. about the note, and S. said he would go and see about it, and went and talked to W., but said nothing to plaintiff. Later he proposed to plaintiff to go into partnership with him and W., putting in the note as capital; and then he took over the business and property from W., paying him some cash, and assuming the debts, among which, at the time, he mentioned this. Held, that he was estopped to say that W. did not sign the note as his agent, and that he had not ratified it.

Statute of Frauds—Oral Ratification.—A Promissory Note, such as, under Civil Code, section 2309, must be in writing, is a commercial note, not a mere non-negotiable promise to pay, and the latter may be ratified orally.

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action by J. E. Goetz against Simon Goldbaum on a promissory note. Judgment for plaintiff. Defendant appeals. Affirmed.

Aitken & Smith for appellant; Daney & Wright for respondent.

¹ Cited as authority for saying that "ratification may be proved under a plea of due execution," in *Blood v. La Serena Land & Water Co.*, 113 Cal. 228, 236, 41 Pac. 1019, 45 Pac. 254, though the court proceeded to say that the evidence in the case before it fell short of making the proof, tending more strongly to establish an estoppel.

TEMPLE, C.—Defendant appeals from the judgment and an order refusing a new trial. The action is based upon a non-negotiable promissory note, and in the complaint it is alleged that on the fifth day of October, 1891, defendant executed and delivered a promissory note in writing, in the words and figures following. The note is then set out at length, and is signed, “Simon Goldbaum, per Wm. G.” There is no averment showing who Wm. G. was or that he had authority to execute the note as the agent of defendant. The complaint was demurred to for insufficiency of facts, and as ambiguous, in that it appears that the note was executed by some person other than defendant, but does not show who such person was or that he had authority to execute the note as agent. The same objection is also made on the ground of uncertainty. It is now contended that the complaint should set out the facts, and not conclusions, and that, if the fact be that the note was made through an agent, it should be so averred. *St. John v. Griffith*, 1 Abb. Pr. (N. Y.) 39, is quoted, in which it is said: “The code requires facts to be stated, not fiction; the facts of the case, and not the mere legal conclusion. Such a statement as that adopted by the plaintiff is not only admissible, but necessary.” In that case it was averred that the act was done by the agent. That decision was by a subordinate court, and is not in accordance with better considered cases. The plaintiff is required to state the facts which constitute his cause of action. The constitutive fact here is plainly that defendant executed the note. Whether by an agent or in person is immaterial. If by an agent, such fact is not one which constitutes his cause of action.

But it is argued, inasmuch as it appears that the note was executed through an agent, the authority should appear. This point is answered by the case of *Sherman v. Comstock*, 2 McLean, 19, Fed. Cas. No. 12,764. In the declaration in that case it was averred that defendant made his note or check in the words and figures following:

“Detroit, December 14, 1838.

“Cashier of the Michigan State Bank:

“Pay to Morgan and Clark, or bearer, \$674.96 thirty days from date.

“[Signed] HORACE H. COMSTOCK.

“By JOEL CLEMENS.”

There was no further allegation as to agency. The declaration was demurred to on the ground that it did not appear that Clemens was authorized to act as agent for defendant. The court said: "As it regards the execution of the note by the defendant, it is sufficiently averred in the declaration. He signed it by Joel Clemens; and that Clemens was authorized to act in the premises appears, for that his act is alleged to be the act of his principal. The declaration might have contained an averment that Clemens was duly authorized to act as the attorney in fact of the defendant, but such averment is unnecessary."

Appellant next complains of the findings. He says that it is nowhere found that defendant executed the note; that, on the other hand, it is found that the note was executed by William Goldbaum, without authority to act as the agent of Simon; and that, in another finding, it is found that William Goldbaum did have implied authority to execute the note as the agent of Simon. In the first finding, it is found that William Goldbaum executed the note which is set out in the finding, pretending to act as the agent of Simon. The use of the word "pretending" is unfortunate, but the context plainly shows that the idea intended to be conveyed is that, in executing the note, William claimed to be acting as the agent of Simon. The court then proceeds to state that William had no express authority; sets out facts from which it draws the conclusion that the act was ratified and adopted by Simon as his act. The court did not find in direct terms that the defendant executed the note, but it found that it was executed by William, claiming to act as the agent of Simon, and that Simon ratified the act; in other words, adopted the instrument as his own. Ratification is in law the equivalent of a previous command. It is proof of due execution. This suggestion is also a sufficient answer to the objection that ratification should be pleaded. It is true the general rule is that estoppel should be pleaded when under the practice there had been an opportunity to plead it; but ratification is not estoppel, although there is often an element of estoppel in it. But the point is also made that the evidence does not justify the finding that there had been a ratification. It appears that prior to October, 1890, William Goldbaum had been carrying on a mercantile business at Oceanside, and had also been engaged in the livery busi-

ness in partnership with plaintiff. In October, 1890, he failed, and was forced to transfer his property to his brother Simon, the defendant. He made a settlement with most of his creditors, and his brother Simon took a transfer of all the property, including William's interest in the stable, and paid or appeared to pay such debts of William as were then paid. I state the matter in this form because William testified that the money advanced by Simon really belonged to him (William). It was then arranged between William and Simon that William should continue the business in the name of Simon. Goods were to be purchased in the name of Simon, and all transactions were to be in his name. This was necessary, because William had not been able to settle with all of his creditors. The business was carried on in pursuance of this agreement for about one year before the note was given. During that time plaintiff had loaned to William \$300 to be used in his business. He then arranged to sell his half of the livery-stable to William. The arrangement was made, and the note in question was given, for the \$300 which had been previously loaned, and for plaintiff's interest in the stable. Of course, plaintiff knew that the business was being carried on in the name of Simon Goldbaum, and, when he took the note, he asked William if he had authority from Simon to act for him, and was told by William that he had. Plaintiff testified that he knew the business was being conducted by William in the name of Simon, because William told him so. Some two weeks after getting the note, plaintiff went to San Luis Rey to ask Simon Goldbaum about the note. He showed Simon the note, and asked if it was all right. Mr. Goldbaum said: "I don't know what they are doing in town. I will go in this afternoon and see." Plaintiff replied, "Monday will do." Monday, Simon Goldbaum went to the store and had a private talk with William. Plaintiff was there, but Simon said nothing to him about the note. The testimony of William Goldbaum shows that at that time Simon had a full explanation in regard to the note. Simon Goldbaum said nothing more about the note to plaintiff until November, 1892, when he proposed to plaintiff to go into partnership with himself and William, and said he could put the note in as a part of his capital. In January, 1893, a difference arose between William and Simon Goldbaum. The latter claimed the goods

in the possession of William, and which constituted the stock in trade with which William was doing business in the name of Simon Goldbaum. The controversy was settled, Simon Goldbaum taking the business and property, and paying William some \$1,700, besides assuming the indebtedness. While negotiations were progressing, a list of debts was produced, which did not contain the debt to plaintiff. Defendant called attention to the fact, and said: "The indebtedness must be more. It is best that we foot up the indebtedness, and make a settlement on that basis." And again: "There is that Goetz note, too. Don't forget to put that in—six hundred dollars. . . . I will have to pay that." For various reasons, appellant contends that this does not amount to ratification:

1. Because, he says, William did not, in the purchase of the interest of plaintiff in the livery-stable, claim to act as agent, but in his own right. An act not done as agent cannot be ratified. The evidence shows very plainly that the parties to the transaction each understood that William Goldbaum, in making the trade, professed to be acting as the agent of his brother. The note is itself some evidence of that fact; and then plaintiff asked if he had authority to sign the note. Plaintiff knew that William Goldbaum was conducting business in his brother's name, but testified that he knew no more of it than others. Of course, he knew that the interest in the stable which had formerly belonged to William had been conveyed to Simon. The real question is, inasmuch as William really owned the business, although it was conducted in the name of his brother, is not the obligation his, although in the name of his brother? If Jones were to buy out Smith & Co., and were to continue the business on his own account, but in the name of Smith & Co., as to those who knew the facts Smith & Co. would be but an alias of Jones. It does not appear that plaintiff knew that all the property belonged to William, and it does appear that Simon Goldbaum claimed that it belonged to him. The reason why the business stood in the name of Simon was to avoid the creditors of William. It was a hiding of the goods, or they really belonged to Simon, with the understanding that William should somehow get the benefit of the business. Under the circumstances, I think Simon Goldbaum cannot be heard to say that William was not conducting the business as his agent, even as to those who did know the facts.

2. It is contended that the act of William in executing the note could only be ratified by a writing, because it is said a promissory note must be in writing: Civ. Code, sec. 2309. But waiving the point that the instrument set out in the complaint is conceded not to be a "promissory note," within the meaning of the code, the contract is not one required by law to be in writing. Only when in writing, it is recognized by commercial law as a promissory note; but the contract is simply an agreement to pay money, which need not be in writing.

3. The facts do not show ratification. I think the facts are quite sufficient, and, furthermore, that, when Simon took the business subject to the payment of the debts, he was under obligation to pay the note. It was not required to be in the memorandum, because Simon Goldbaum recognized his liability on the note, and in effect so said at the time. There is evidence contradicting the testimony to which I have alluded. As the case is presented here, that is of no consequence.

Several objections were made to the introduction of evidence. After examination, I am satisfied that none of them were well taken. A discussion of them would serve no useful purpose. I recommend that the judgment and order be affirmed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

ORR v. KERN COUNTY.

No. 19,382; September 1, 1894.

37 Pac. 649.

Constables—Fees.—Statutes of 1893, Page 310, section 7, providing that, in counties of the class to which K. county belongs, constables shall receive "such fees as are now or may hereafter be allowed by law," does not make any change in the existing law relating to fees of constables in that county.

APPEAL from Superior Court, Kern County; A. R. Conklin, Judge.

Action by T. B. Orr against the county of Kern to recover constable's fees. Judgment was rendered for defendant and plaintiff appeals. Affirmed.

Patten & Graham and R. J. Ashe for appellant; J. W. Ahern and A. T. McCreery for respondent.

DE HAVEN, J.—The superior court drew the correct conclusion of law from the facts found, and the judgment must therefore be affirmed. Section 7 of the act of March 23, 1893 (Stats. 1893, p. 310), amending the act of March 31, 1891, establishing a uniform system of county governments, provides that, in counties of the class to which the county of Kern belongs, constables shall receive "such fees as are now or may hereafter be allowed by law." It is too plain to admit of argument that by this language the legislature meant to say that constables should, until otherwise enacted, continue to receive the same fees in the county of Kern as they were then allowed by law. In other words, it was not the intention of the amendatory act of March 23, 1893, to make any change whatever in the existing law relating to the fees of constables in that county. Judgment affirmed.

We concur: McFarland, J.; Fitzgerald, J.

JONES et al. v. LOS ANGELES & P. RY. CO.

No. 19,315; September 3, 1894.

37 Pac. 656.

Appeal.—Though a General Demurrer to a Complaint was Overruled by consent, defendant may, on appeal from a default judgment after answer, question its sufficiency.

Forfeiture.—A Complaint for Forfeiture of a Right of Way granted on condition of the construction of the road on the line

designated, continuous operation of the road when constructed, establishment of stations at points to be designated by plaintiff, and maintenance of the road in good condition, which alleges that the stations were not established, that the road on its completion was not operated continuously or at all, and that it has long since ceased to be operated, and has not been kept in good condition, but has been allowed to become wholly out of repair, and that there has been a total failure to comply with the conditions, sufficiently states, as against a general demurrer, the completion of the road and breaches of the conditions.

APPEAL from Superior Court, Los Angeles County; J. W. McKinley, Judge.

Action by John P. Jones and others against the Los Angeles and Pacific Railway Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Wells, Monroe & Lee for appellant; Anderson & Anderson for respondents.

PER CURIAM.—This action was brought by plaintiffs to declare forfeited a certain right of way granted by them to the Los Angeles County Railroad Company, the predecessor in interest of the defendant, upon the ground that certain conditions subsequent attached to the grant had not been complied with. Defendant interposed a general demurrer to the complaint, which was overruled by consent and an answer filed. The defendant did not appear at the trial, and plaintiffs had judgment, from which defendant appeals. The only question presented is as to the sufficiency of the complaint. The demurrer being general, the fact that it was overruled by consent is immaterial. One of the conditions of the grant of the easement was the erection and construction of the road on the line designated and the operation of the road when constructed. The second condition was that the company should establish two stations on the line granted, the particular points of each of said stations to be selected by the parties of the first part (the plaintiffs herein). It is further provided in the agreement that, upon the completion of the road, it should be operated continuously and without interruption; and again, if the corporation should “at any time hereafter cease to operate said railroad, or fail or refuse to keep the same in

good order and condition, . . . then the grant hereby made and all rights thereunder shall cease and determine." The complaint alleges breaches of the foregoing conditions, to the effect that said stations were not established nor the station-houses built at the places mentioned, or at any place selected by the plaintiffs herein, or at any place at all; and as to the other conditions it is alleged "that neither the defendant nor the Los Angeles County Railroad Company, upon the completion of said railroad, operated the same continuously or without interruption, so as to accommodate the transportation of freight and passengers between the city of Los Angeles and the town of Santa Monica; but, on the contrary, said railroad has not been operated at all, . . . and has never left or received passengers or freight in the usual manner of first-class railroad lines, or at all, at any such stations, and that the defendant has long ceased to operate said railroad, and has failed and refused to keep the same in good order and condition, but has allowed the same to become completely out of repair, and has altogether failed to comply with any of the conditions of said agreement." The complaint is not well drawn, but, in the absence of a special demurrer, we think it sufficient to state a cause of action. Taking its allegations together, it may be fairly construed as alleging the completion of the road; and, assuming that fact to be sufficiently stated, its remaining allegations are entirely sufficient in charging breaches of various conditions of the agreement heretofore quoted. For the foregoing reasons it is ordered that the judgment be affirmed.

HORTON v. JACK et al.*

No. 19,328; September 4, 1894.

37 Pac. 652.

Limitation of Actions.—An Action for Conversion is Within Code of Civil Procedure, section 338, subdivision 3, prescribing the limitation of an action for taking, detaining or injuring goods or chattels.¹

Executors—Conveyance for Individual Debt—Conversion.—One to whom an executrix conveys property of the estate, in payment of her individual debt, before distribution, and without authority of the probate court, is, on refusal to return, liable to the estate for conversion, though the executrix was the sole legatee, and the property was the community property, and executrix was testator's widow. In order to maintain such action, it is not necessary to prove an

*For subsequent opinion, see 115 Cal. 29, 46 Pac. 920.

¹ Cited in Snyder v. Jack, 140 Cal. 585, 74 Pac. 139, as part of the history of the case, thus: "This case has been here three times and the decisions on those appeals are reported respectively in Horton v. Jack, 37 Pac. 652, 115 Cal. 29, 46 Pac. 920, and 126 Cal. 522, 58 Pac. 1051. Subsequently Horton died and the present plaintiff was substituted in his place."

Cited with approval in Allsop v. Joshua Hendy Mach. Works, 5 Cal. App. 234, 90 Pac. 42, where the defendant, as the court showed, had erroneously pleaded section 337 and subdivision 1 of section 339 of the Code of Civil Procedure.

Cited in Lowe v. Ozmun, 137 Cal. 259, 260, 70 Pac. 87, where the court, explaining, said: "In cases of unlawful taking or detaining personal property, the wronged party has usually the option of either bringing an action for its specific recovery or an action to recover its value; that is, an action which at common law would have been replevin or detinue or trover. Section 338 looks to the wrong—to the thing itself—and not to the particular kind of action which may be used to obtain the remedy."

Cited in Kramm v. Stockton Electric R. R. Co., 10 Cal. App. 280, 101 Pac. 918, where the case, so frequently before the court on appeal, is explained in its several phases, with the comment finally: "Thus, it will be seen there was no question as to the credibility of the witnesses, no conflict as to the facts was involved, but the court determined that necessarily the same legal effect must follow from the same facts."

indebtedness against the estate and necessity of obtaining the property to satisfy it.¹

Executors—Conveyance for Individual Debt—Conversion.—

Though the person to whom an executrix conveys property belonging to the estate does, as he agrees, have it applied on the claim of a bank against her individually, the bank is not jointly liable with him to the estate for the conversion of the property, it not being shown that he was acting for the bank in such manner as to bind it.

APPEAL from Superior Court, San Luis Obispo County;
V. A. Gregg, Judge.

Action by Joseph Horton, administrator with the will annexed of James A. Brown, deceased, against R. E. Jack and the First National Bank of San Luis Obispo. Judgment for defendants. Plaintiff appeals. Reversed as to defendant Jack.

M. C. Hester and Graves & Graves for appellant; Wilcoxon & Bouldin and J. M. Wilcoxon for respondent.

TEMPLE, C.—This appeal is from the judgment and from an order refusing a new trial. The complaint shows that James A. Brown died testate October 26, 1889, in the county of Santa Barbara, leaving his widow, Catherine J. Brown, his executrix; that said will was duly admitted to probate, the said Catherine J. appointed executrix, and that she duly qualified as such, and took possession of the property of the estate, consisting in part of certain personal property, which is specifically described in the complaint; that on the fifteenth day of April, 1890, while the said executrix was lawfully possessed of said property, as the property of the estate, defendants “wrongfully and without right took and carried away said personal property, and the whole thereof, and converted and disposed of the same to their own use.” Said property was at the time of the value of \$6,000. Catherine J. Brown died April 17, 1892, not having closed the administration.

¹ Cited in *Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 225, 107 Pac. 297, where the court distinguishes between the validity of an act of ownership by a sole legatee before and such after the expiration of the time allowed for presentation and payment of the debts of the estate.

Proper allegations follow, showing due appointment and qualification of plaintiff as administrator with the will annexed. The complaint was demurred to for insufficiency of facts, and because it appeared from the complaint that the cause of action was barred by section 339 of the Code of Civil Procedure. The demurrer was overruled, and defendants answered separately. The answer of the bank consists of denials. The answer of defendant Jack denies the conversion, the alleged value of the property, the official character of plaintiff; avers that Catherine J. Brown was paid the full value of the property, and that the cause of action is barred by section 339 of the Code of Civil Procedure. The answer then proceeds with an averment that James A. Brown, by his will, bequeathed all his property to Catherine J. Brown, and appointed her executrix, with power to sell personal property without leave of court; that she qualified, and afterward procured an order authorizing her to sell the personal property, including the property described in the complaint, at private sale; that she did, subsequently to the order, execute to Jack a bill of sale of the property, but did not deliver the same to him, but afterward agreed with Jack that the property should be delivered to one Sanderecock, to be by him sold, the proceeds, less expenses, to be paid to Jack for the bank, and to be applied to an indebtedness of said Catherine J. to it; that thereupon said Catherine J. appointed said Sanderecock her agent, and delivered the property to him; that Sanderecock sold the property as her agent, and, at her request, paid the money to the bank. The answer then proceeds with a plea in bar of plaintiff's claim.

Respondent raises a preliminary point, to the effect that plaintiff is entitled to no relief, because his complaint shows that his cause of action is barred by the statute of limitations, and the demurrer on this ground should have been sustained. If the demurrer were well taken, it would not follow that respondent could avail himself of the point on this appeal; but, waiving that, the point is not well taken. The question suggested is whether an action for the conversion of goods is barred by subdivision 3 of section 338 of the Code of Civil Procedure. Respondent claims that such an action is not covered by that section, and is therefore included in section 339, and is barred in two years. The complaint shows that the

suit was not commenced within two years after the alleged conversion. Subdivision 3, section 338, reads: "An action for taking, detaining, or injuring any goods or chattels, including actions for the recovery of specific personal property." Cooley defines "conversion" as follows: "Any distinct act of dominion wrongfully exerted over one's property, in denial of his right or inconsistent with it, is conversion." The author also quotes with approval from *Liptrot v. Holmes*, 1 Kelly, 381: "The action of trover being founded on a conjunct right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant. It is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is, in law, a conversion." While there may be cases, under this definition of "conversion," where there is no manual taking or corporal detention of the property, still I apprehend there is no case in which the plaintiff has not been actually deprived of his property, or is not entitled under the rules of law to consider himself deprived of it for the sake of the remedy, and when a judgment for damages for the conversion has been paid the wrongdoer becomes the owner of the property. It has been wrongfully taken from the owner, although it is not necessary that the original taking be wrongful. The words in the statute are not used to indicate any particular form of action, but I think it applies to all those cases in which the person injured has a remedy in an action of claim and delivery, or for conversion. Certainly, one whose property has been wrongfully taken or detained may sue for conversion, if at the time he was entitled to the possession of it. I think the case falls within the provisions of section 338, and the cause of action was not barred.

The cause was tried by the court without a jury, and the court found for the defendant Jack, a nonsuit having been entered as to the bank. Several findings of fact are excepted to as not sustained by the evidence. Among such findings are the following: (1) That the personal property was never delivered to Jack, although it is admitted that a bill

of sale of the property was made and delivered to him; (2) that Sandercock, who took the property and sold it, was the agent of the executrix, and not the agent of Jack; and (3) that the proceeds of the property were paid to the executrix.

1. It seems that Mrs. Brown was indebted to the bank, of which Jack was president; that it was agreed between Jack and Mrs. Brown that the property should be conveyed to Jack as security and immediately sold, and the proceeds paid on Mrs. Brown's personal indebtedness to the bank. In pursuance of this agreement an absolute bill of sale was executed, and Sandercock was selected to sell the property, with the consent of Mrs. Brown. Having delivered the bill of sale to Jack, and agreed upon Sandercock as a proper person to conduct the sale, Mrs. Brown prepared a letter to be handed by Sandercock to Bailey, her agent, and which was so delivered. It was as follows:

"Mr. S. P. Bailey—

"Dear Sir: I have made a bill of sale to Mr. Jack of the whole outfit. Mr. Sandercock, the bearer of the note, will consult you about the disposition of the outfit. If Mr. Sandercock cannot manage the disposition of the same without your help, then you will please go with him. Mr. Sandercock acts as Mr. Jack's agent and the entire disposition must be under Mr. Sandercock's control.

"C. J. BROWN."

Mr. Sandercock, also, at the same time, handed Bailey a letter from Mr. Jack, as follows:

"Mr. Bailey—

"Dear Sir: This will introduce to you my friend, Mr. John G. Sandercock. I have bought of Mrs. J. A. Brown the whole grading outfit which belonged to the late J. A. Brown, and I send him down to represent me in the premises, and to sell according to the general plan that you have arranged. You will therefore please deliver the whole business to my representative, Mr. Sandercock. I should be pleased to have you accompany Mr. Sandercock, and assist him all in your power. Mrs. Brown's desire also is that you shall accompany Mr. S., and aid with your counsel and co-operation.

"Yours truly,

"R. E. JACK."

Bailey, acting for Mrs. Brown, had already arranged to ship the goods to Modesto for sale. They were then turned over to Sandercock, who shipped them to Modesto. Bailey accompanied him, but acted in entire subordination to Sandercock. The property was sold and the proceeds sent by Sandercock to Jack, who applied them to the payment of Mrs. Brown's individual debt to the bank. At the trial Mr. Jack testified as follows: "The understanding, as between Mrs. Brown and Mr. Unangst and myself, was that he would put this property into my hands to be sold for her, and the amount applied on this bank indebtedness. We were then making advances after the property was sold, and the money paid into my hands. I placed it to the account of Mrs. Brown in the First National Bank, i. e., account to her during her lifetime for the moneys so received. I always accounted for them. They were applied to her account at her request." On cross-examination he testified: "Q. Did you ever have any account with Mrs. Brown as executrix of the estate of J. A. Brown? A. I told you yesterday I hadn't. . . . Q. Did you ever file a claim with her in a formal way, and have her approve it as administratrix or executrix of the estate? A. No. . . . Q. She never borrowed any money from your bank, did she? A. Yes; borrowed a great deal. Q. What was the amount of it? A. I don't know what amount it was. Q. Did she borrow herself? Did she get the money? A. Yes." Mr. J. A. Brown had been engaged in certain work at Port Harford. After his death, Mrs. Brown continued the work on her own account, at a loss. A small part of the indebtedness was that of Mr. Brown, which was never presented to the estate for allowance. Most of it was incurred by Mrs. Brown herself. From these extracts, I think it is evident that the findings, in the respects mentioned, are not sustained by the evidence. In the nature of things, there could not well be a substantial conflict upon these points.

The court also found that Jack had not converted the property to his own use. That he took the property, by the consent of Mrs. Brown, to sell, and to apply the proceeds to the payment of her individual debt to the bank, cannot be denied. Did it amount, under the circumstances, to a conversion? Of course, when Mrs. Brown conveyed the property to Jack in payment of her individual debt, she misappropriated it. She

put it out of her power to hold the property as executrix for the estate, and subject to the orders of the court. It was a clear violation of her duty. It was a wasting of the estate which would constitute a devastavit. Ordinarily, no doubt, one who receives property under such circumstances in payment of an individual debt of the executrix to him may be treated by the successor of such executrix, after a demand and a refusal to deliver the property, as a wrongdoer. Respondent contends that such consequence cannot follow here, because the executrix was also sole legatee, and therefore had the power to sell and apply the property to her own use. The will does not in terms authorize the executrix to sell property without leave of the court. Nor, if it be conceded that all the property is by the will bequeathed to the widow, would that consequence follow. As legatee she could sell her interest subject to the administration. In the will the testator declared all his property community property. He then gave one dollar each to two brothers and three sisters. He then declares that he has executed deeds to his wife for his real estate, and deposited them in escrow, to be delivered to his wife upon his death. He then bequeaths his personal property to his wife, but directs that his wife "shall, by will or otherwise, cause any and all residue or remainder of my real estate and personal property remaining after her death to be distributed [to his brothers and sisters], but I wish her, my said wife, to be untrammelled in the use of said estate during the term of her natural life." Subsequently to the sale to Jack and by him, and the application of the proceeds, Mrs. Brown died. The sale to Jack was never confirmed by the probate court. There had, however, been made an order of sale which authorized the executrix to sell the personal property at private sale. No report was ever made to the probate court of any sales made through Sandercock, but the executrix reported to the court that she had, through mistake, sold the property in question to Jack to pay her individual debt. Thereupon, the probate court refused to confirm the sale. It does not appear whether or not there are debts outstanding against the estate, or whether the administrator with the will annexed has in his hands money or property with which to pay the expenses of administration. Nor does it appear when notice to creditors was published, or, indeed, whether such no-

tice has been published at all. The construction of the will is a matter for the probate court, but I will assume that the will gave the property to Mrs. Brown absolutely, except that she was denied the power of testamentary disposition. One-half she did not take under the will, but it all was subject to the right of the personal representative to have the custody during administration, and to the payment of the debts of the testator and the costs of administration. The executor undoubtedly has such title and right of possession as will authorize him to maintain an action for the conversion of the assets of the estate. Nor do I see how title derived from an heir or legatee can constitute a defense, or put the executor to the necessity of proving an indebtedness to satisfy which the property is necessary. The vendee in such case may have rights which should be protected when the estate is finally distributed to the beneficiaries under the will. Pending the administration, however, the legatees have not the right of possession, and may be held for conversion if they wrongfully deprive the executor of the property. A contrary rule might lead to great trouble and loss. It may not be known whether there are creditors or not until nearly ten months have elapsed. Yet the administrator is responsible to creditors for the preservation of the property. If the vendee of an heir had made way with property, and had become insolvent, the administrator could not defend himself on the ground that he had delivered the property to an heir; and, besides, it cannot always be known who are heirs or legatees until distribution. Power to declare the succession, to determine heirship, and to construe wills, is in the probate court. Courts in which suits of this character may be brought cannot determine such questions; and, if such defense may be made, it would lead to delay and expense. The policy of the law certainly is that estates should be quickly settled, and administrators should not be exposed to such litigation. Until distribution, the right of the representative should be absolute, in the interest of all concerned. A fair illustration of the possible evils of such a rule would be in the well-known Blythe estate. Suppose a "claimant" in that estate had property and would not deliver it because there were sufficient assets without it? Would any court where such suit was brought against the claimant be compelled to determine the question of heirship? The right of a legatee

differs a little from that of an heir. But there is no difference under the statute as to the right of a legatee to possession prior to distribution. Nor do I see that the fact that the property was community property can make a difference. The widow does not take her share of the common property as heir, but her title is subject to administration and payment of debts. Her title is no more absolute than that of an heir at law, and the administrator has the same right of possession. Respondent has not been able to cite an authority which will sustain the conclusion reached by the court. He cites, however, *Hunt v. Hunt*, 11 Nev. 442, *Presby v. Powers*, 81 Ill. 125, and *Rutherford v. Thompson*, 14 Or. 236, 12 Pac. 382. In *Hunt v. Hunt*, it was held that the widow was the devisee of the property, and that her deed conveyed title subject to administration, and that the title of the purchaser was good—not as against the executor, but as against an heir at law. *Presby v. Powers* is a miscitation. I have found no such case. In *Rutherford v. Thompson* no such question was involved. A person, not the legal representative and not an heir or legatee, had disposed of some of the property, and the question was how far the common-law doctrine applicable to executors de son tort obtained in Oregon. It is enough, however, in my opinion, to say that the legislature has given to the personal representative the custody of the property, and has made him responsible for it, and has also provided the mode in which he may be discharged of his responsibility. The power of the legislature over the subject is plenary, and the law recognizes no such exception as it is sought to establish in this case. As we have seen, the will contains no grant to the executrix of power to sell. The fact that the property was bequeathed to the same person who was named as executrix is not the equivalent of such power, nor does it make a case which comes within the decision in *Re Delaney*, 49 Cal. 85. I think, therefore, the court erred in holding that Jack did not convert the property to his own use.

The cause of action was not barred by the judgment rendered in the suit of *R. E. Jack v. Catherine J. Brown*. Mrs. Brown was not sued in her representative character, nor was any question raised in the case as to the right of Mrs. Brown to dispose of the property to Jack. The validity of the sale was not questioned. The action was brought to foreclose a

mortgage given by Mrs. Brown upon real estate. No mention of this property was made in the complaint. In the answer it is averred that a portion of the debt was paid by the sale to him by Mrs. Brown of certain personal property. It is not shown in any way that it is the property involved in this action, but conceding that it was, it is not claimed that it belonged to the estate. Having bought it as the property of Mrs. Brown, and sold it, and applied the proceeds to the payment of his debt, Jack could not then have refused to give her credit for it. Both parties, then, repudiated the title of the estate.

There was no error in granting a nonsuit as to the bank. Quite possibly, plaintiff could have shown that Jack was acting for the bank in such manner as to bind the bank, and render it jointly liable. I do not find such testimony in the record. I think the judgment of nonsuit in favor of the corporate defendant should be affirmed, but that the judgment and order in favor of defendant Jack should be reversed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment of nonsuit in favor of the corporate defendant is affirmed, and the judgment and order in favor of defendant Jack are reversed.

PADEN v. GOLDBAUM et al.

No. 19,400; September 4, 1894.

37 Pac. 759.

Execution Against Husband.—In an Action by a Wife to Recover for cattle alleged to be her separate property, but sold on execution by a judgment creditor of her husband, although the evidence shows that her husband returned the stock for taxation in his name, and had the use thereof for dairy purposes, and represented to the judgment creditor that he was owner thereof, if it appears that the stock was bought by the wife with money earned before marriage, and its increase was reserved as her property, a finding that the stock was in fact hers will not be disturbed.

Trial—Findings.—Where the Sole Issue is the Truth of the allegations of the answer, a finding “that the allegations of the separate defense contained in the answer of the defendant G. are untrue” is sufficient.

Execution Against Husband—Levy on Wife's Property.—A Finding That the Allegations in the answer are untrue is justified when the only allegations therein are that the plaintiff, by her conduct, held out her husband as the owner of her separate stock seized on execution against him, and that, on faith thereof, credit was given the husband, and such allegations are contradicted by evidence showing that the creditor ordered the sheriff to seize the property in question, and gave a bond indemnifying such sheriff against the claim of the wife, and had constructive notice of such claim by a previously recorded statement of her separate property, including the stock seized.

Trial—Findings.—Where an Answer Contains Two Separate Defenses, viz., a denial of the allegations of the complaint and a justification of the acts complained of, a finding for the plaintiff on the first defense renders a failure to find on the second immaterial.

Execution—Bond of Indemnity to Sheriff.—Code of Civil Procedure, section 689, as amended by Laws of 1891, page 20, provides that, if one claiming property seized on execution serves on the sheriff a sworn claim setting out his title and his right to possession, the sheriff need not keep the property, unless the execution plaintiff gives a bond of indemnity to him against such claim. Held, that proof of the service on the sheriff of such claim is admissible against the sheriff in an action by a claimant for the wrongful seizure of property, though it is not pleaded in the complaint, since the statute is for the benefit of the sheriff, and is matter of defense.¹

¹ Cited and approved in *Brenot v. Robinson*, 108 Cal. 145, 41 Pac. 38, where it was said: “If the form of the demand did not comply with the section of the code, the defendant could traverse the allegation in his answer, and could also object to the proof when offered at the trial.”

Cited and commented upon in *Kellogg v. Burr*, 126 Cal. 42, 58 Pac. 308, where the court said that if, as there held, “said section 689 is intended for the protection of the sheriff,” upon the making of the claim “the sheriff is not bound to retain the property unless he is indemnified, and may release it without incurring a liability therefor to the plaintiff in attachment or execution.”

Cited and criticised in *Breard v. Lee*, 192 Fed. 74, the court saying: “In fact, in *Paden v. Goldbaum*, supra, the question is left in doubt by failing to decide whether this statute would be any protection to the sheriff in an action such as the present.” The action was one by the

Execution Against Husband—Estoppel of Wife to Set Up Ownership.—Where a husband pastures his wife's cattle in return for their use for dairy purposes, she reserving the increase, such use by the husband, accompanied by a representation on his part that they were his, cannot, in the absence of any such representation on her part, or any act tending to mislead one holding a judgment against her husband as to the ownership of the stock, estop the wife from setting up ownership to defeat an execution levied on the stock under such judgment.¹

Execution Against Husband.—An Inventory of a Wife's Separate Property, filed with the recorder, is admissible in evidence, against a judgment creditor of her husband, in an action to recover her separate property seized by him on execution, though the husband's debt to him was contracted before such filing, if the levy of execution was made subsequent thereto.

Evidence.—The Account-books of a Judgment Creditor are original evidence to establish claims against the debtor, and should be introduced as part of the case, and it is proper to exclude them when offered in rebuttal.

Execution—Exemptions.—Evidence as to Indorsements on a Sheriff's Writ of execution, whereby part of the property seized thereunder was surrendered as exempt, was properly excluded on the ground that its ownership was not in issue.

Execution Against Husband—Property of Wife.—The Testimony of a Witness in regard to a conversation with the judgment creditor prior to the execution, wherein he offered to take a new note from the husband if the wife would sign it, was admissible to show that the creditor had knowledge that the property levied on was the property of the wife.

Evidence—Value of Cattle.—Where a Witness Testifies that he has been in the dairy business for seven years, and is familiar with the value of cattle for that business, his testimony as to the value

owner of property against a person who had directed the sheriff to levy on it, the plaintiff not being the judgment debtor.

Cited in *Aber v. Twichell*, 17 N. D. 233, 116 N. W. 97, among many cases named as construing in the several states laws similar in effect to section 6951, Revised Codes of North Dakota.

¹ Cited with approval in *Basshore v. Parker*, 146 Cal. 529, 80 Pac. 708, a case where, however, the judgment in execution of which the levy was made had been against the wife alone, while the property seized was community property. The court said: "As to the declarations of the wife made in the absence of and without the knowledge of her husband, those declarations, of course, cannot be held to raise an estoppel where his title to the community property is involved."

of the cattle in suit is admissible, although he has not seen them for a year previous to the execution.

Pleading—Unverified Complaint.—Code of Civil Procedure, section 437, provides that "where the complaint is not verified a general denial is sufficient." Held, that where an unverified complaint alleges the value of property converted and the answer is a general denial, the value is put in issue.

APPEAL from Superior Court, San Diego County; W. L. Pierce, Judge.

Action by Flora J. Paden against Simon Goldbaum and B. F. Hubbert for the conversion of livestock. Judgment for plaintiff and defendants appeal. Affirmed.

Aitken & Smith and Hunsaker, Goodrich & McCutcheon for appellants; Withington & Pearson and J. P. Pearson for respondent.

HAYNES, C.—In this action the plaintiff had judgment, and defendants appeal therefrom and from an order denying a new trial. The complaint alleged that on January 13, 1893, the plaintiff, the wife of Alfred Paden, was the owner of certain milch cows and other cattle, and of certain horses and other personal property; that defendants, knowing that it was her separate property, took possession, and converted it to their own use, under the false pretenses that it was the property of her husband, to her damage in the sum of \$3,000. Hubbert justified, alleging that he was a constable, and took the property under a writ of execution issued upon a judgment in favor of his codefendant against Alfred Paden, whom he alleged was the owner. Goldbaum denied all the allegations of the complaint, and alleged the recovering of the judgment; that he was a merchant; that Alfred Paden conducted a dairy, milk and stock ranch, and used said stock as the owner; that during said time he extended credit to Alfred Paden, and that the plaintiff, by her acts and conduct, represented the fact to be that her husband was the owner, and permitted him to represent himself to be the owner, of the property in question; that the conduct of both was such as to imply and cause defendant to believe that Alfred Paden was the owner; that he gave credit because thereof; that he had

no knowledge of any claim of ownership by plaintiff, and in giving credit relied upon said acts, conduct, representations and declarations of the plaintiff; and that he would be injured by allowing the truth thereof to be disproved by plaintiff. Findings were for the plaintiff, upon which judgment was entered against both defendants for the sum of \$1,160.

The finding that plaintiff was the owner of the property is attacked. The evidence tends to show that the husband was the owner of about two hundred acres of land; that his wife was the owner of the stock; that under an arrangement between them the husband had the use of the stock for conducting the milk business, the wife to have the increase of the stock. There seems to be no doubt that the husband used and spoke of the property as his own, and sold and bought and traded portions of it with the consent of his wife, and returned the property for taxation in his own name. It does not appear, however, that she ever spoke of the property as his, while it does appear that there were rumors in the neighborhood that the stock belonged to her. That her money earned by her before her marriage was invested in stock, and that she was in fact the owner of the stock in question, is, I think, justified by the weight of the evidence; but, if it were doubtful, the conflict is such as to prevent the appellate court from disturbing the finding.

The plaintiff offered in evidence an inventory of property claimed therein to be her separate property, dated April 20, 1891, and filed with the recorder May 7, 1891, which included part of the property in question; the remainder, as plaintiff claimed, being the increase of the stock therein mentioned, or other stock replacing that which had been sold or exchanged. This inventory was received in evidence over defendants' objection. Defendants contend that the statute makes such inventory notice and prima facie evidence of the title of the wife, but only from the date of filing, while the indebtedness of the husband to Goldbaum was contracted in 1888, and that it was therefore inadmissible to prove notice and title at the time the debt was created. Very true; but it was admissible to prove notice of her claim at the time of the levy of the execution, to the extent, at least, that the stock therein described was seized under the execution. If defendant Goldbaum's plea of estoppel had been sustained, it might be that

the evidence would not benefit the plaintiff, but that did not affect its admissibility.

As to defendant Goldbaum's answer, the court found "that the allegations of the separate defense contained in the answer of defendant Simon Goldbaum are untrue." This finding is said to be insufficient, and that it is not supported by the evidence. As to the sufficiency of this finding, counsel cite *Goodnow v. Griswold*, 68 Cal. 603, 9 Pac. 837. In that case the court found specifically several facts, and then made the following finding: "The court finds that the several allegations of said complaint not in conflict with the foregoing findings are true." But what allegations were or were not in conflict with the findings made were not specified by the trial court, and that question the appellate court held it was not called upon to determine. The sufficiency of the finding here made is sustained by *Johnson v. Klein*, 70 Cal. 186, 11 Pac. 606; *Moore v. Waterworks*, 68 Cal. 146, 8 Pac. 816; *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965. The new matter in the answer was deemed denied, and, as no new matter was or could be pleaded thereto, the sole issue was as to the truth of the averments of the answer and that was determined by the finding. Whether that finding is justified by the evidence will be considered hereafter.

It is also assigned for error that the court failed to find upon defendant Hubbert's answer. This answer contained two defenses; the first consisting wholly of denials of the allegations of plaintiff's complaint, and the second a justification under the writ of execution. The findings cover the issues raised by the first defense, and, those issues having been found for the plaintiff, a finding that defendant Hubbert had a writ and took the property under it would not have affected the conclusion of law that plaintiff was entitled to judgment. A finding thereon was therefore immaterial, unless counsel are correct in the construction given by them to section 689 of the Code of Civil Procedure, as amended in 1891 (*Laws 1891*, p. 20), a question we shall now consider. Section 689 of the Code of Civil Procedure, prior to the amendment, provided for a sheriff's jury to try the claim of a third person to property levied upon by the officer. That section, as amended, is as follows: "689. If the property levied on be claimed by a third person as his property by a

written claim verified by the oath of said claimant, setting out his title thereto, his right to the possession thereof, and stating the grounds of such title, and served upon the sheriff, the sheriff is not bound to keep the property unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnify the sheriff against such claim by an undertaking by at least two good and sufficient sureties; and no claim to such property is valid against the sheriff, or shall be received, or be notice of any rights, unless made as above provided." Upon the trial, plaintiff was permitted, over the objection of defendants, to prove the service of a written claim—in all respects conforming to the above provision—upon the constable prior to the sale of the property, the objection being made upon the specific ground that the complaint did not allege service of such claim. The argument is that under this statute there can be no recovery against the officer unless such claim is served; that it cannot be given in evidence unless it is pleaded; and that, therefore, the justification set up in the answer is a good defense, notwithstanding plaintiff's ownership, and therefore a finding of the facts constituting a justification would sustain a judgment in favor of the officer, and was material, and should have been made.

The first question here presented is one of pleading. In statutory actions a compliance with all the provisions conferring the right must be alleged: *People v. Jackson*, 24 Cal. 630. This, however, is not a statutory action, but one which existed at common law. The former statute, as well as the amendment, was intended for the protection of the officer, and is therefore matter of defense. It is an exception to a general right which need not be alleged in the complaint: 1 Chitty's Pleading, *p. 247. If the plaintiff had omitted to make the verified claim required by the amendment, the omission, if it could operate as a protection to the officer in this form of action, should in such case be alleged in the answer. The making or omitting to make the verified claim does not affect the ownership of the plaintiff, but, if not made, excepts the officer from liability in certain actions, and is matter of defense. "Wherever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, *prima facie* well founded, whether called by the name of a 'proviso' or a 'condition subsequent,' it must, in its nature, be a matter

of defense, and ought to be shown in pleading by the opposite party": 1 Chitty's Pleading, *p. 246. The case of *Himmelmann v. Danos*, 35 Cal. 447, cited by appellants, is not applicable here. That was an action to enforce a lien upon a lot for macadamizing a street, and the complaint did not allege the proceeding required by the statute. The case of *Barry v. McGrade*, 14 Minn. 163 (Gil. 126), cited by appellants, sustains their contention, although the question of pleading is not discussed. The statute there considered was similar to ours, and it was held that the plaintiff must prove the service of the affidavit of claim in order to maintain the action. If it is necessary to be proved by the plaintiff in chief, so as to prevent a nonsuit, it must be alleged in the complaint. We cannot, however, assent to the reasoning or the conclusion of the court in that case. In the absence of the statute, the right of the plaintiff depends solely upon ownership; and it must be apparent that if the plaintiff, being in fact the owner, cannot recover, it must be because the statute exempts the defendant from liability, and not because it controverts the fact of ownership. It could no more be necessary for the plaintiff to anticipate a claim on the part of the officer that he was not liable because a verified claim was not served than to anticipate the plea of estoppel by Goldbaum by alleging facts inconsistent with that defense. It is entirely analogous to pleading the statute of frauds or the statute of limitations, which must be taken by answer, unless the defense appears on the face of the complaint, when it may be reached by demurrer. If the verified claim had not been offered in evidence by the plaintiff, the omission would not have availed the defendant Hubbert, since he had not alleged that a verified claim was not served. The result was that the plaintiff disproved a defense not made—a circumstance which could not prejudice the defendant. Whether the failure of a plaintiff to serve such verified claim would be a defense to an action for damages for the conversion of the property, or only to an action in claim and delivery to recover possession of the property from the officer (a question discussed by counsel), need not be considered here, in view of the conclusion reached upon the question of pleading.

It is also contended that the second finding is not justified by the evidence, in that there is no evidence that defendant

Goldbaum took possession of the property, or directed or aided anyone to take possession, or that he disposed of it. The officer took the property under a written direction from Goldbaum's attorney, of which the following is a copy: "You are instructed to levy upon all the horned and neat cattle, horses and other personal property (excepting household furniture) of the defendant, whether said cattle and property be at defendant's place of business, at Oceanside, or at his farm, at San Luis Rey; and you are instructed to have all milch cows regularly and properly milked while in your possession, prior to sale." It does not appear that there was any other property of that description at either of the places mentioned than that levied upon, and all of it, Goldbaum testified, he believed to be owned by Mr. Paden, and the attorney who gave the instruction testified, in substance, that, before he gave the instruction, Mr. Paden told him it was his property; and hence there is no question that the instruction was intended to cover the property in controversy, and required the officer to levy upon it. Not only so, but the constable required from Goldbaum a bond of indemnity, and this was given. Independently of the rumor which Goldbaum says he heard, about the time he commenced his suit against Mr. Paden, that this property belonged to the wife, he had also at least constructive notice of her recorded claim, and following this came the demand from the officer for a bond of indemnity. Whether this demand was accompanied by notice of plaintiff's verified claim does not clearly appear. But it was after the seizure and before the sale. An indemnity bond had been previously given, but whether before or after the seizure does not appear. The additional bond was given, and operated as a ratification of the taking, and was in effect a request, if not a direction, to sell notwithstanding the plaintiff's claim, since, under section 689 of the Code of Civil Procedure, as amended in 1891, the officer "is not bound to keep the property unless the plaintiff . . . on demand, indemnify the sheriff against such claim by an undertaking," etc. Whether upon receiving the bond, the officer is bound to keep possession and sell, it is not necessary to consider. The finding in question is justified by the evidence.

It is also urged by appellants that, if the finding against defendant Goldbaum's plea of estoppel is sufficient, such find-

ing is not justified by the evidence. Mrs. Paden testified that the arrangement between herself and husband was that he pastured the stock for the use of the cattle, and she had the increase. This contract she had a right to make, and the use of the stock under it by the husband could not of itself create an estoppel against his wife. The objection here urged necessarily concedes that she is the owner; and no one else, the arrangement itself being lawful, reasonable and proper, could, by word or act, create an estoppel against her. So far as the estoppel pleaded relates to the time when the indebtedness which was finally merged in the judgment was created, there was no evidence which tended to support the plea. Mr. Goldbaum testified that at the time credit was given "he [Paden] was running a dairy there, and had cattle and land, and I thought he was good. He was running it in his own name. Mrs. Paden was living with him at the time as his wife. She got some of those groceries from me. . . . Mrs. Paden never notified me that she owned any of the cows during the running of this bill, nor that she owned this business, or owned any of the stock." He did not testify to any act or statement done or made by Mrs. Paden which misled him, or that she was at any time called upon to assert her ownership, and was silent, or that she intentionally or deliberately led him to believe that her husband was the owner of the stock, or to act on such belief. Section 1962, subdivision 3 of the Code of Civil Procedure, provides: "Whenever a party has, by his own declaration, act or omission, intentionally or deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it." We find no evidence upon which a finding in favor of the defendant upon his plea of estoppel could be sustained, whether it relates to the period when credit was given or the time when the execution was levied. That the husband generally spoke of the property as his is doubtless true, but it does not appear that he ever spoke so of it when the question of ownership was discussed, or otherwise than casually in connection with the dairy business he was conducting. But if he had asserted his ownership when that was a material question, unless it was with the knowledge of the wife, and the defendant was misled by her silence when she was called upon to assert her

ownership, her title to the property would not be affected. There would be little protection given the wife in respect to her separate property, if, upon the facts of this case, it could be taken to satisfy the husband's debt. There is nothing in *Barnhart v. Fulkerth*, 90 Cal. 159, 27 Pac. 71, inconsistent with our conclusion, nor is it necessary to comment upon the cases cited from other states, since, if they laid down a different rule from that prescribed by the code, they could not be authority here.

Defendants called a witness in rebuttal, and asked him whether he had any conversation with Mr. Paden since January 11th, about a visit paid to the Padens that day. The court, of its own motion, interposed, saying, "We cannot have this sort of testimony for the purpose of convicting Mr. Paden upon an immaterial point." Counsel thereupon offered to prove by the witness Hayes and by defendant Hubbert that, a few days after the eleventh day of January, Mr. Paden said to the witnesses named that he (the counsel) "had been at their house, and as he expressed it, was doing some detective work, and he had acknowledged to me at the time the cattle were his." Counsel for plaintiff did not object to the offer, but the court ruled that it was not competent evidence, saying to counsel for the plaintiff, "If you are willing that it should go in, I do not know that I ought to say it should not, but it would take another day to finish the case, and I will not admit it." The conversation referred to was given in the testimony of counsel, during the examination of defendants' witnesses in chief, to the effect that Mr. Paden, in a conversation with the witness before the execution was issued—the plaintiff being present—said he was running the dairy; that witness asked him whose cattle they were, and "he said they were his cattle."

In rebuttal, Mr. Paden gave a different account of the conversation. Counsel, at the time of this conversation, was at Paden's house on other business. Mrs. Paden was at work making butter, and took no part in the conversation. Nothing was said in regard to Goldbaum's claim or of any effort to collect it. The inquiry was apparently without motive, and did not call for any remark by Mrs. Paden. That she should remain silent was natural. Under the circumstances, she was not affected by the statement of her husband, conceding it to have been as testified to by defendants' counsel;

and, if so, the proposed evidence was immaterial, unless for the purpose of impeaching Mr. Paden's testimony in chief, so far as it tended to prove Mrs. Paden's ownership, by showing that he had made statements inconsistent with his testimony. The evidence being immaterial for any other purpose, all testimony tending to show such contradictory statements should have been given by the defendants in chief, and no part of it could be reserved to rebut plaintiff's rebuttal. The defendant can only rebut new matter brought out in plaintiff's rebuttal, unless the court, in its discretion, permits it. Under these circumstances the exception will not avail appellants.

We think the court did not err in excluding Goldbaum's account books, offered by defendants in rebuttal. They were original evidence, and should have been introduced by defendants as part of their case. But, as defendants were allowed, without objection, to give oral evidence of the accounts, a liberal ruling would have permitted their introduction after plaintiff, in rebuttal, disputed the oral testimony. Defendants were not prejudiced, however, as the object of the evidence was to show that credit was given for merchandise because of Mr. Paden's supposed ownership—a defense that was not sustained by the evidence.

The evidence offered to be shown by Edward J. Martin was properly excluded. What the attorney who drew up the declaration of separate property for Mrs. Paden said about it in her absence was clearly inadmissible, while the fact that it was necessary to go to Mrs. Paden before he could get title to the property would not have benefited defendants.

The indorsements on the constable's return, showing that certain of the property seized was claimed by Mr. Paden to be exempt from execution, and was surrendered to him, was properly excluded. That property was not in litigation, and it was immaterial to whom it belonged.

The testimony of Joseph Jones, a witness for plaintiff, to a conversation with defendant Goldbaum in October preceding the levy of the execution, was properly received. We have held that the instruction to the constable required him to levy upon the property here in question, so that the objection that Goldbaum had nothing to do with the levy is not tenable, while the answer of the witness shows that at that date Goldbaum knew that Mrs. Paden owned or claimed to own the

property, and had offered to Paden to take a new note for half of the amount if Mrs. Paden would also sign it. This also disposes of the objection to a similar question put to William H. Libby.

The witness Olds testified that he had been in the dairy business for the last seven years, and was familiar with the values of cattle for dairy purposes; that he had seen these cattle two or three times, the last time being about one year before the trial. This was sufficient to qualify him to testify as to value. It is true he did not see the cattle at the time they were taken, and could not know their condition at that time, but if their condition had changed it was competent for defendants to have shown that fact. His testimony was not so satisfactory, for that reason, nor perhaps entitled to as much weight, as if he had seen them at the time of their conversion, but that was not sufficient to require its exclusion. But it was further objected that there was no issue as to the value. The complaint alleged the property converted to be of the value of \$2,000. If no issue was taken upon this allegation, the defendants are not injured by the finding of damages at \$1,186. But the complaint was not verified, and each of the defendants denied "each and every, and all and singular, the allegations of the complaint"; and this put in issue the value of the property converted, under section 437 of the Code of Civil Procedure, which provides, "If the complaint be not verified a general denial is sufficient," and puts in issue every material allegation of the complaint.

Appellants, on their motion for new trial, specified fifty-eight errors of law occurring on the trial. We have noticed only such of them as counsel have mentioned in their brief; but we have carefully read the entire record, and find no error justifying a reversal, and advise that the judgment and order appealed from be affirmed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

RAYMOND v. GLOVER et al.*

No. 19,335; September 4, 1894.

37 Pac. 772.

Vendor and Vendee.—Where an Agent for the Sale of Land, intrusted with a deed thereof, through the negligence of the vendee, who knew that he was authorized to deliver the deed only after a purchase money note and mortgage were executed to the vendor, fraudulently took the note and mortgage in his own name, there was no valid delivery, and the vendor was entitled to a lien for the price, as against an innocent purchaser of the mortgage.¹

Vendor and Vendee.—Where a Vendee Signs a Purchase Money Mortgage, payable to the vendor's agent, under the belief that it is payable to the vendor, after having ample opportunity to examine it, he cannot contest its validity as against an innocent purchaser.

APPEAL from Superior Court, Los Angeles County;
Walter Van Dyke, Judge.

Action by Ellen D. Raymond against George W. Glover, Sarah J. Glover, George Munroe and the German-American Savings Bank to establish a vendor's lien. Plaintiff had judgment and the defendant bank appeals, and, by a cross-bill, seeks to foreclose a mortgage. Affirmed and remanded.

Walter Bordwell and Chapman & Hendricks for appellant; Lee & Scott and Wilson & Lamme for respondents.

TEMPLE, C.—This appeal is from the judgment, with a bill of exceptions. The complaint, as amended, shows: That on the first day of July, 1891, plaintiff owned a certain tract of land in the county of Los Angeles, and on that day entered into an agreement with the defendant George W. Glover to sell to him said tract of land for \$1,800, of which sum \$500 was to be paid in cash, and \$1,300 to be secured by mortgage on the place, payable in three years, with interest at nine per cent per annum. That plaintiff was absent from the state, and the sale was negotiated by her through defendant George

*For subsequent opinion, see 122 Cal. 471, 55 Pac. 398.

¹ Cited in the note in 130 Am. St. Rep. 947, on escrows.

Munroe. That afterward, to wit, January 22, 1892, plaintiff executed and forwarded to said Munroe a deed duly signed and acknowledged, conveying said property to George W. Glover and Sarah J. Glover, his wife, with instructions to deliver the same to George W. Glover upon receiving the promissory note of said Glover and wife, secured by mortgage as provided in said agreement, and the payment of \$500 cash. That said Munroe received the deed, and, in violation of the instructions to him, gave into the possession of defendant George W. Glover said deed without receiving the said promissory note or mortgage, and said Glover caused the deed to be recorded in the recorder's office of Los Angeles county. Though said Glovers paid the said sum of \$500, they wholly failed to execute said note and mortgage, or pay the said sum of \$1,300 or any part thereof, and the same is still unpaid. That said Munroe, at the time he gave said deed into the possession of said Glover, fraudulently prepared a note and mortgage for \$1,300, running and payable to himself, and induced said Glovers to execute the same under the belief that plaintiff was named in said note and mortgage as payee. That the defendant the German-American Savings Bank afterward caused said mortgage to be recorded, claiming to be the assignee thereof. That said note and mortgage were executed and delivered without the knowledge or consent of plaintiff. That she had no knowledge of such facts until after the pretended assignment to the defendant bank. That said note and mortgage were without consideration other than as herein set forth, and were taken by said Munroe in violation of his duty, and in fraud of plaintiff's rights. That at the time of the delivery to said George W. Glover of said deed and the execution and delivery to him of said note and mortgage, said Glover had full notice of the agency of said Munroe, and that said Munroe had no right or authority to take such note and mortgage. That the sole consideration for the note and mortgage was the conveyance, and said Munroe had no authority to take them otherwise than in the name of plaintiff, of which facts the bank had full notice. She asks the court to decree that the note and mortgage were accepted, taken and held by Munroe as her trustee, and are now held by the bank as her trustee, or that she has a vendor's lien upon the premises for \$1,300 and interest, and such other relief as

may be equitable. The appellant, the bank, answered, denying all the allegations in the complaint, and averring an assignment to itself for a valuable consideration and without notice. Appellant also filed a cross-complaint, in which it seeks to foreclose the mortgage. To this cross-complaint the Glovers answer, averring that the note and mortgage were wholly without consideration and were procured by fraud. They also filed a cross-complaint, in which they set out the alleged fraud and want of consideration, and ask to have the note and mortgage declared void. To this cross-complaint the appellant answered, denying the fraud, and pleading want of notice, and its purchase for a valuable consideration.

The court found the sale of the land as averred by the plaintiff; that plaintiff was a nonresident; that she signed and acknowledged the deed, and sent the same to Munroe with the instructions averred; that Munroe handed the deed to Glover without taking his note or mortgage as he was instructed to do; that Munroe received the said \$500 from Glover, but, instead of taking the note and mortgage payable to plaintiff, fraudulently prepared a note and mortgage for the same amount payable to himself, and, with intent to deceive said Glovers, represented to them that the note and mortgage were made in favor of plaintiff, in accordance with the terms of the agreement, and pretended to read the papers to the Glovers, but fraudulently read the name of plaintiff as payee; that, relying upon the representations and deceived by the false practices, the Glovers executed the note and mortgage fraudulently prepared by Munroe, believing that they were payable to plaintiff and in accordance with their agreement; that the note and mortgage were so executed without the knowledge or consent of plaintiff, who did not know of the fraud until after the assignment of the bank.

The note and mortgage were without consideration, and were taken by Munroe in violation of his duty, and in fraud of the rights of plaintiff. At the time of the execution of said note and mortgage, said Glovers well knew that Munroe had no authority to accept such a note and mortgage, or any note or mortgage in his own name. Afterward, on the 23d of February, 1892, said Munroe assigned the note and mortgage to defendant bank as security for the payment of a note of \$1,000 then borrowed by Munroe from the bank. Prior to

receiving said assignment and to the loaning of said money by the bank, its cashier, for the purpose of ascertaining the value of the property, and also whether said Glovers had any setoff or other defense to the note and mortgage, went with Munroe to the residence of George W. Glover, and thereupon said Munroe, without the hearing of the cashier, stated to Glover that he (Munroe) had bought the note and mortgage from plaintiff. Thereupon, said cashier told said Glover that the bank was about to loan to Munroe \$1,000 upon the note and mortgage which he and Mrs. Glover had given, and asked how much he was owing on it, and if it was all right, to which Glover replied that \$1,300 was due on the mortgage, and it was all right. Glover did not then know that Munroe had been named in the note and mortgage as payee, but believed that the note and mortgage had been purchased by Munroe. The representation was made without any intent to mislead the bank and in the honest belief that Munroe had bought the note, and had the right to hypothecate it. The court failed to find whether the bank loaned the money to Munroe, and took the assignment in good faith, without notice of plaintiff's equities. The evidence shows, however, without contradiction, that the appellant acted in entire good faith, without knowledge that plaintiff had any claim to the debt, or that Munroe had ever been her agent or that she had been the owner of the land.

The first question which presents itself is whether there was a valid delivery of the deed. There was an agreement in writing, in which the terms of the sale were fully stated. The Glovers, therefore, knew perfectly well that the deed was not to be delivered until the note and mortgage were executed to plaintiff. Munroe was a special agent, and the possession of the deed under the circumstances had no tendency to show ostensible authority. The delivery of the deed was therefore in violation of the power of the agent. *Schultz v. McLean*, 93 Cal. 329, 28 Pac. 1053, is not opposed to this conclusion. In that case the purchaser did not know of any conditions in regard to the delivery of the deed other than those with which he had complied. He had made an offer for the land. The agent of the grantors notified him of the acceptance of his offer. As a matter of fact, according to the finding, the grantees did not accept the offer, but asked further consideration.

The agent falsely told the purchaser that his offer was accepted and the grantors that their counter offer was accepted. The deed was then passed, each party believing upon terms he had proposed. The misunderstanding was through the fraud of plaintiff's agent. The vendors and vendee met several times during the negotiations. It was held that the agent was enabled to accomplish the fraud in consequence of the negligence of the grantors. They were therefore compelled to bear the loss. Plaintiff here has been guilty of no neglect. Nor can I see how the case differs as to the appellant. The claim is that because Munroe was the agent of plaintiff, and was placed in a position where he could consummate the fraud because of such agency, therefore plaintiff must bear the loss. There may be language in some of the cases which would sanction this broad statement of the rule. The rule, however, is not peculiar to the law of agency, but is general. Generally, it is stated as in our code: "Where one of two innocent parties must suffer by the act of a third, he by whose negligence it happened must be the sufferer": Civ. Code, sec. 3543. The statement is slightly self-contradictory, but really, I think, states the true rule. Beyond this, I see no justice in it. The fact that one has been placed by my act in a position which will enable him to defraud another does not make me liable—not even if I have trusted a dishonest man, and thereby raised his credit. If I lend my horse to one who proves to be a rogue, and he, taking advantage of his possession, sells the horse, the purchaser cannot hold me for it. But it was not even the trust reposed in Munroe by plaintiff that placed in his hands the instrument which enabled him to defraud appellant. Her instructions were explicit, and were well known to the only parties with whom he was authorized to deal. Whatever, therefore, may be the rights of the bank, as against Glover, I think it plain that plaintiff is entitled to the first lien upon the property to secure her debt of \$1,300.

But the case is very different between Glover and the bank, assuming, as we must, that the bank took the security without notice. The note was non-negotiable, and naturally the obligor could interpose any defense against a purchaser which he had against the payee named. But the bank, before taking the security, sent its agent to Glover, and, after informing him

of the contemplated loan, inquired if he had any defense, and was informed by Glover that he had none. It is found that Glover did not then know that the note had been originally given to Munroe, but believed that plaintiff had assigned it to Munroe. Even had such been the fact, it was a lack of diligence to assure the bank that Munroe's title was all right upon Munroe's word that he had bought the note. But there was gross negligence in the execution of the note. I do not mean to say that Glover could not have defended against Munroe, though some of the cases seem to go that far. But it is the precise case provided for in the maxim quoted—that, when one of two innocent men must suffer, he shall bear the loss whose negligence has occasioned it. There would be very little use in having written instruments if there were no presumption that when one signs such he does so knowing what he is signing. Men do not usually execute such papers until they have carefully examined them. It must be, therefore, that to execute them without such care is negligence. The business of the world could hardly be carried on upon any other hypothesis. There was no fiduciary relation between Munroe and Glover. On the contrary, their interests were adverse. It appears, further, that Munroe practiced no arts to induce Glover to sign without reading. The mortgage and note were filled out at Glover's house, and in his presence. The note was a printed form, and with only a few blanks to fill, one of which necessarily was the name of the payee. When they were finished and ready to sign, Munroe did not volunteer to read them, but handed them to Glover and requested him to read them. Glover said his eyes were bad, and requested Munroe to do so. It is hard to believe, under such circumstances, that Munroe contemplated any such deceit as the court finds. The notary, the only really disinterested witness, testified that the note and mortgage were correctly read. There was, however, conflicting testimony, and the court finds that they were incorrectly read. But Glover had no right to trust his adversary, and, when the question is whether he or an innocent party must suffer for his negligence, he must bear the loss: *Hawkins v. Hawkins*, 50 Cal. 558; *Blaisdell v. Leach*, 101 Cal. 405, 40 Am. St. Rep. 65, 35 Pac. 1019; *Plummer v. Bank*, 90 Ind. 386; 2 *Herman on Estoppel*, sec. 1004.

As there is no finding upon the question raised as to the good faith and want of notice of the bank, the case should be remanded, with directions to find whether or not the bank took the note as security without notice of the facts tending to show its invalidity. This fact may be found upon the evidence already taken, with such further evidence upon that subject as the parties may see fit to submit. If the court finds for the appellant upon that subject, the plaintiff should be allowed a preferred lien for \$1,300 and interest, as provided in the contract of sale, and the bank should be allowed to retain the lien of its mortgage, subject to plaintiff's lien, to the extent of its debt against Munroe.

We concur: Vanciel, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the cause is remanded, with directions to find whether or not the bank took the note as security without notice of the facts tending to show its invalidity. This fact may be found upon the evidence already taken, with such further evidence upon that subject as the parties may see fit to submit. If the court finds for the appellant upon that subject, the plaintiff should be allowed a preferred lien for \$1,300 and interest, as provided in the contract of sale, and the bank should be allowed to retain the lien of its mortgage, subject to plaintiff's lien, to the extent of its debt against Munroe.

ADDITIONAL OPINION.

October 3, 1894.

PER CURIAM.—The opinion heretofore filed herein is modified by striking out the following paragraph: "Whatever, therefore, may be the rights of the bank, as against Glover, I think it plain that plaintiff is entitled to the first lien upon the property to secure her debt of \$1,300," and inserting in lieu thereof the following: "Whatever, therefore, may be the rights of the bank, the plaintiff, as against Glover, is entitled to a lien upon the property to secure her debt of \$1,300." The judgment rendered herein is set aside, and the following judgment is given: For the reasons given in the foregoing opinion the cause is remanded, with directions to find whether

or not the bank took the note as security, without notice of the facts showing the equities in favor of the plaintiff. This fact may be found upon the evidence already taken, with such further evidence upon that subject as the parties may see fit to submit. If the court finds that the appellant took the note as security, without notice of the facts showing such equities, judgment should be rendered giving to the appellant a first lien upon the property for the amount of his claim, and to the plaintiff a second lien thereon to the extent of \$1,300 and interest, as provided in the contract of sale.

GRUSS v. ROBERTSON et al.

No. 18,283; September 5, 1894.

37 Pac. 772.

New Trial.—The Granting a New Trial on the Ground of newly discovered evidence is discretionary with the trial court.

APPEAL from Superior Court, Plumas County; G. G. Clough, Judge.

Action by Joseph Gruss against Martha Robertson and others. From an order granting a new trial, defendants appeal. Affirmed.

Goodwin & Goodwin for appellants; C. E. McLaughlin for respondent.

PER CURIAM.—This is an appeal from an order granting the plaintiff a new trial upon the ground of newly discovered evidence, and the only question is, Did the court abuse its discretion in making the order? It is true that “applications for new trials upon the ground of newly discovered evidence must be looked upon with suspicion and disfavor, because the temptation to make a favorable showing after having sustained a defeat is great”: *Arnold v. Skaggs*, 35 Cal. 684. But it is also true that “applications on this ground are addressed

to the discretion of the court below, and the action of the court below will not be disturbed, except for an abuse of discretion, the presumption being that the discretion was properly exercised": Hayne on New Trial and Appeal, sec. 87; People v. Sutton, 73 Cal. 248, 15 Pac. 86; People v. Urquidas, 96 Cal. 240, 31 Pac. 52. At the hearing of the motion affidavits were read by both sides, and it must be presumed that they were properly looked upon and considered by the court. They were conflicting as to some of the facts stated, but it was the province of that court to determine on which side was the truth. Assuming, therefore, as we must, that the facts stated in the plaintiff's affidavits were true, we think there was a sufficient showing to meet the requirements of the law in such cases and to justify the order. At any rate, we cannot say that the action of the court was an abuse of its discretion. The order appealed from is affirmed.

PERKINS v. SUPERIOR COURT OF FRESNO COUNTY.

No. 15,711; September 10, 1894.

37 Pac. 780.

Appeal from Justice.—An Appeal will not be Dismissed because the bond was not filed within thirty days after the rendition of the judgment by a justice of the peace, if the bond was delivered and left at the office of the justice, but was not received or marked "Filed" by him until two days after the thirty days.

Petition by one Perkins for a writ of prohibition against the superior court of Fresno county to prevent proceedings on appeal. Writ denied.

Warlow & Hargrove and Wm. Grant for petitioner; Miles Wallace for respondent.

BEATTY, C. J.—The petitioner moved the superior court to dismiss the appeal from a judgment rendered in his favor by a justice of the peace. The ground of the motion was that

the undertaking on appeal had not been filed within thirty days after rendition and entry of the judgment. The superior court denied the motion, and this is a petition for a writ to prohibit further proceedings upon the appeal. It appears from the allegations of the petition that ample evidence was adduced at the hearing of the motion to warrant the superior court in finding that the undertaking was delivered and left at the office of the justice of the peace within the thirty days, and that it was not received by him, or marked "Filed." until two days after that time because of his absence from his office and from the county. If this was the case the superior court has jurisdiction of the appeal. Writ denied.

We concur: McFarland, J.; Garoutte, J.; Fitzgerald, J.

DE HAVEN, J.—I concur in the judgment.

SAN FRANCISCO & FRESNO LAND CO. v. BANBURY,
County Treasurer et al.*

No. 19,370; September 13, 1894.

37 Pac. 801.

Tax Sale—Notice to Redeem.—Where the State is the Purchaser of land at tax sale, the controller and the attorney general have no authority to give notice for the state of an intention to apply for a deed.

Tax Sale—Notice to Redeem—Purchase by State.—There being no statutory provision for the disposition of a fee for notice of intention to apply for a deed of lands sold to the state for taxes, it must be taken as the legislative intent that no such fee should be charged.

APPEAL from Superior Court, Los Angeles County;
Walter Van Dyke, Judge.

Action by the San Francisco and Fresno Land Company against J. Banbury, as treasurer of Los Angeles county, and others, to compel the acceptance of money paid for the re-

*For subsequent opinion in bank, see 106 Cal. 129, 39 Pac. 439.

demption of land sold for taxes. Judgment for defendants, and plaintiff appeals. Reversed.

Holdridge O. Collins (James M. Allen and McAllister & Frohman of counsel) for appellant; Spencer G. Millard for respondents.

HARRISON, J.—In June, 1892, the plaintiff, as the owner and successor in interest of sixty-seven lots of land in McPherson's addition to the town of McPherson, formerly in the county of Los Angeles, but now in the county of Orange, sought to redeem them from a sale for delinquent taxes, made to the state of California March 12, 1889, and for that purpose tendered to the defendant Banbury, as treasurer of the county of Los Angeles, the sum of \$225.00. It is conceded that this amount of money was sufficient to effect the redemption, unless the sum of three dollars for each lot, amounting to \$201, for giving the notice of an intention to apply for a deed and the affidavit therefor, fixed as a fee for giving such notice by section 3785 of the Political Code, should also have been tendered. The county auditor, in his estimate of the amount to be paid for redemption, included this item in the certificates issued by him under the provision of section 3817 of the Political Code, and the treasurer refused to accept the amount tendered, or to give to the plaintiff the certificates named in said section. The plaintiff thereupon brought this action to compel the treasurer to accept the sum tendered as above, and to give to it the triplicate receipts prescribed by the aforesaid section 3817. The cause was tried in the court below and judgment rendered for the defendant, from which, and from an order denying a motion for a new trial, the plaintiff has appealed.

Several questions are discussed in the briefs of counsel, but the conclusion which we have reached upon one of these questions renders it unnecessary to determine the others. In May, 1892, the defendant House, acting under the direction of the state controller, gave the notices referred to in section 3785 of the Political Code, and filed his affidavit thereof with the tax collector of Los Angeles county. These several notices were signed, "State of California, by R. F. House, Agent." and in the affidavit of service filed with the tax collector

House stated that he was the "agent for the purchaser of the property described in the foregoing notice." House also testified at the trial that prior to the date of giving the notice "he had been appointed by the state of California, through the state controller and attorney general, and was authorized to serve notices to cause the redemption of property sold to the state for taxes." The question here presented is not the right of the state to the issuance of a deed, but the right of the delinquent taxpayer to redeem the land struck off to the state under the provisions of section 3773 of the Political Code, and this right depends upon his compliance with the requirements of the statute in that behalf, the particular questions here presented being whether there was a tender of a sufficient amount of money to effect the redemption. It is insisted by the defendants that the plaintiff, in addition to the amount tendered by it, should have also tendered three dollars for each of the notices given by House, amounting to \$201 in all; while the plaintiff insists that the notice given by House was without authority of law, and consequently that the item of three dollars for giving such notice was not a part of the "costs and expenses of the redemption." Section 3817 of the Political Code provides that, when the state has become the purchaser of land sold for delinquent taxes, the person whose estate has been sold, or his successor in interest, may redeem the same by paying the amount of taxes due thereon at the time of the sale, with interest thereon, and any other taxes then delinquent thereon, together with a sum of money equivalent to the taxes that would have been subsequently assessed; "and also all costs and expenses, and twenty-five per cent penalty which may have accrued by reason of such delinquency and sale, and the costs and expenses of such redemption." Unless the item of three dollars for giving the notice is a part of the "costs and expenses" which have accrued "by reason of the delinquency and sale," the plaintiff was under no obligation to tender it to the treasurer in order to effect a redemption from the sale. Section 3785 makes provision for the issuance of a deed to the purchaser in case there is no redemption from the tax sale, and requires that before making application for a deed the "purchaser" must serve upon the owner of the property purchased a written notice, containing certain

statements, and that for the service of said notice and making an affidavit thereof the "purchaser" shall be entitled to receive the sum of three dollars, "which sum of three dollars shall be paid by the redemptioner at the same time and in the same manner as other costs, percentages, penalties, and fees are paid." The notice thus required is to be served by the purchaser, or by some one in his behalf, whom he has authorized to serve it. Such notice, served by a stranger, without any authority from the purchaser, would not satisfy the requirements of the statute, or entitle the purchaser to insist upon a payment or tender of the three dollars, in order that a redemption might be effected; and the rule in this respect is the same whether the state or an individual is the purchaser. The state can act only through officers or agents, and the duties of its officers or agents must be defined by statute, and the officer or agent who would give this notice must show his authority therefor under some statute. We have not been cited to any statute which confers upon either the controller or attorney general the right to appoint an agent for the purpose of giving this notice, or to take any step in reference to the issuance of a deed to the state for the property which may be struck off to it under the provisions of section 3775 of the Political Code. The duties of each of the above-named officers are defined in the Political Code—those of the controller in sections 433 to 444, and those of the attorney general in sections 470 to 475—and in neither of these sections can there be found any authority for either of these officers to give the above notices, or for the appointment of an agent to give the notices in behalf of the state. The provision in section 433, making it the duty of the controller "to superintend the fiscal concerns of the state," only designates him as the accountant of the state's finances, and does not give to him any function recognizing the same until the money over which he is to exercise a supervision or control has come into the hands of the treasurer, or some fiscal agent of the state, or has become an obligation in favor of the state, for which the state is entitled to an immediate enforcement. The duty imposed upon this officer by virtue of subdivision 16 of this section, "to direct and superintend the collection of all moneys due the state, and institute suits in its name for all official delinquencies in

relation to the assessment, collection and payment of the revenue," arises only when the moneys thus to be collected are "due the state," and after there has been some official delinquency in relation to the collection or payment of the revenue. But, if the state has become the purchaser of land at a delinquent tax sale, the tax has been extinguished by the sale, and the state instead of being a creditor of the taxpayer, or entitled to receive any money due to it for taxes, has acquired an interest in the land, which is to be divested only by some affirmative action on the part of the delinquent taxpayer. The care and direction of the state's interest in land would naturally fall to the department of the surveyor general; but, whether that officer has been intrusted with any function in reference to the lands purchased at a delinquent tax sale, or whether the state has failed to make any provision in reference thereto, it is clear that neither the controller nor the attorney general has been intrusted with the duty of guarding the state's interest therein.

It is not the policy of the state to increase the burdens of taxation beyond the necessary cost of collection, or to impose any greater burdens in a redemption from a delinquent tax sale than is necessary to secure the payment of the original tax. All matters of taxation are resolved in favor of the taxpayer, and express statutes should be found for each item of cost to be imposed upon him. There is no provision of law for the disposition of the three dollars claimed herein as a fee for giving the notice. Neither the controller nor the attorney general is entitled to it as a fee, or as a compensation for any official duty; nor, if the state is entitled to receive it, are they authorized to give it to any agent they may select for the purpose of serving the notice. Section 3816 provides that "the original tax and the twenty-five per cent and interest paid in redemption shall be apportioned between the state and county in the same proportion that the state tax bears to the county tax," and then declares, "the moneys received for delinquencies shall be paid to the county," and makes no provision for the disposition of this item. If the legislature had intended that the state, like any other purchaser, should be entitled to charge and receive this item of three dollars, it would have made some provision that it should be paid to it out of the redemption money, and not

that it should be paid to the county. We are of the opinion that the amount tendered by the plaintiff was sufficient for the purpose of redeeming the lands in question, and that the treasurer should have received the money, and issued to it the certificates authorized by the statute. The judgment and order denying a new trial are reversed.

We concur: De Haven, J.; Van Fleet, J.

KRAFT v. WILSON.

No. 18,281; September 14, 1894.

37 Pac. 790.

Agency.—As the Ratification of an Agent's Act is equivalent to a prior command, a finding that an agent had authority to do an act is sustained by evidence that his principal ratified such act.

Agency.—The Question of Ratification of an unauthorized act of an agent is a question of fact.¹

Agency—Estoppel to Deny Authority.—Plaintiff Purchased from Defendant's Son in Law certain stock, part of which belonged to him and defendant and part to defendant and his son, and all of which were running on the same ranch, and credited the amount on the son in law's account with him. Defendant, being told of the sale, gave other stock to his son, to satisfy him, but did not say anything to plaintiff, who had previously purchased stock from the son in law under similar circumstances, as was known to defendant. Defendant took an assignment from his son in law of all his interest in the stock on the ranch, and made several payments on what he himself owed plaintiff, and for which he had given his note, and also told him that his son in law had plenty of property to pay his debt, and at last gave him a mortgage two years after the sale to secure a balance he owed plaintiff. Held, that defendant, who had become the assignee of his son's interest, could not deny the son in law's authority to sell the stock belonging to defendant and his son.

¹ Cited and followed in Union Trust etc. Co. v. Best, 160 Cal. 267, 116 Pac. 738, where, alluding to facts brought out, the court said: "We find in the record further evidence which is ample to sustain an inference that the Burck-Gwynn Company subsequently ratified Edmison's acts. Such ratification is equivalent in effect to precedent authorization."

APPEAL from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Herbert Kraft against H. C. Wilson. There was a judgment for plaintiff and defendant appeals. Affirmed.

Johnson & Chase and Reddy, Campbell & Metson for appellant; N. P. Chipman and L. V. Hitchcock for respondent.

SEARLS, C.—This is an action upon a promissory note made by the defendant December 1, 1888, for \$7,981, payable to plaintiff or his order one day after date, with interest at nine per cent per annum, and in case of a suit for the collection thereof with five per cent upon the amount found due as attorneys' fees. Plaintiff claims a balance due of \$3,838, besides interest, and \$191.90 as attorneys' fees and costs. Defendant answered, admitting the execution and validity of the note, and set up two counterclaims, aggregating \$5,937.50. These counterclaims were disallowed by the court and judgment rendered in favor of plaintiff, from which, and from an order denying defendant's motion for a new trial, he appeals.

The whole case turns upon the validity of defendant's counterclaims. The cause was tried by the court without a jury, and the facts as found, bearing upon the questions involved, although lengthy, are essential to an understanding of the case, and are as follows:

“(1) That said C. G. Alexander is a son in law of defendant, and was so related to defendant ever since 1880; and the said H. F. Wilson was a son of H. C. Wilson, and that said H. F. Wilson is now deceased.

“(2) That the defendant owns, and has for many years owned, a large body of land in Warner valley, in the state of Oregon, used as a stock ranch, upon which he raised horses, mules and cattle.

“(3) That some years prior to 1883 the defendant and C. G. Alexander entered into a contract, by the terms of which the defendant let Alexander have charge of a number of mares and cattle. Alexander was to run these animals on the said Warner Valley ranch, and at the expiration of the lease or contract was to return to the defendant the same number of animals he had originally received; that is, to make the old

stock good, and the balance, or the increase, was to be owned equally by the defendant and C. G. Alexander. In 1883 the defendant and Alexander had a settlement under the terms of their contract. All the animals at that time were branded with the 'heart' brand. In this settlement the animals that were counted out to make the old stock good were branded with the 'bar-heart' brand, to distinguish them from what might be termed the increase. The defendant then turned over to his said son, H. F. Wilson, all animals branded with the 'bar-heart' brand upon a contract by which said H. F. Wilson was to run the 'bar-heart' stock on the said Warner Valley ranch on shares, to pay all the expenses of running them, and at the end of the contract make the old stock good, and divide the increase between his father, the defendant and himself. The 'heart' brand animals, of which C. G. Alexander was the owner of one-half, were then turned over to the said C. G. Alexander under a contract by which he was to run them on shares on the Warner Valley ranch, pay all the expenses of running them, and divide the increase equally between himself and the defendant, H. C. Wilson. All the stock in which H. F. Wilson was interested with defendant, and that in which C. G. Alexander was interested with the defendant—the animals branded with the 'heart' brand and those branded with the 'bar-heart' brand—ran promiscuously upon the Warner Valley ranch.

“(4) Accounts for supplies for the ranch were run at various stores in which supplies for all the ranch and all the stock upon it were charged, without any attempt to segregate the expenses incident to running the stock that H. F. Wilson had on shares from the expenses of the stock that C. G. Alexander had on shares.

“(5) From 1883 to 1889 H. F. Wilson was most of the time on the Warner Valley ranch, and while there had chief control of affairs. About 1889 he left, and did not return. A hard winter came, and destroyed ninety per cent of the stock. H. F. Wilson and his father had no settlement, and H. F. Wilson, after the hard winter, practically abandoned the Warner Valley enterprise.

“(6) From the year 1884 up to the bringing of this action H. F. Wilson, C. G. Alexander and H. C. Wilson did a large banking business with H. Kraft, the plaintiff. H. F. Wilson

created an individual indebtedness with the plaintiff. C. G. Alexander created a large individual indebtedness with the plaintiff, and H. C. Wilson had an individual indebtedness with the plaintiff. In 1884, at the request of H. C. Wilson, an account was opened with H. Kraft under the name of H. C. Wilson and Alexander. The account ran along, until in March, 1886, it had grown quite large, amounting to over \$7,000, when the defendant gave a note to the plaintiff, signed 'H. C. Wilson and Alexander,' in settlement of the account to that date. After this, checks continued to be drawn against the H. C. Wilson and Alexander account up to December 1, 1888. In September, 1886, H. C. Wilson paid the note in full of March, 1886. December 1, 1888, the amount of the H. C. Wilson and Alexander account had reached the sum of \$7,981. On that day H. C. Wilson, at the request of plaintiff, gave his individual note for that amount, and the account of H. C. Wilson and Alexander was credited with the same amount, and closed. This note of December 1, 1888, is the one upon which this action is brought.

"(7) In the meantime the individual account of C. G. Alexander with the plaintiff had been growing from year to year. Some settlement of accounts had been made by Alexander by giving his individual notes. In September, 1890, he owed H. Kraft in all about \$17,000.

"(8) In August, 1890, there was upon the Warner Valley ranch a large number of horses, mules, and cattle. The stock was in three different brands; some branded with a 'heart,' some with a 'bar-heart,' and some branded 'A. X.' H. C. Wilson and C. G. Alexander each owned an undivided one-half interest in the 'heart' brand animals. H. C. Wilson and H. F. Wilson each owned an undivided half interest in the 'bar-heart' brand animals, and C. G. Alexander owned the 'A. X.' brand animals.

"(9) In August, 1890, C. G. Alexander was in Warner Valley in charge of the ranch and all the stock on it, regardless of brands. During all the year 1890, H. C. Wilson resided, and for many years prior thereto had resided, in Tehama county, California, in which county H. Kraft also resided, and also H. F. Wilson. The defendant went to the Oregon ranch once or twice a year, and there remained from one to three weeks.

“(10) In August, 1890, forty-nine head of mules from the Warner Valley ranch were at Lakeview, Oregon, in possession of one Hereford, and held by him under a chattel mortgage signed ‘Wilson & Alexander,’ to secure a debt of over \$2,100, due Cogswell & Ross, of Lakeview, jointly owned by H. C. Wilson and C. G. Alexander. The signatures thereto were written by Alexander, and at the time of their execution H. C. Wilson did not know of their execution.

“(11) In August, 1890, the plaintiff, being desirous of having something paid on the C. G. Alexander indebtedness to him, sent a man by the name of Estes to buy mules of Alexander, and credit the amount agreed to be paid upon Alexander’s indebtedness. Estes, in pursuance of his employment, bought of Alexander thirty-three mules branded with a ‘bar-heart,’ twenty-nine mules branded with a ‘heart,’ and twelve mules branded ‘A. X.’ For part of these mules he agreed to pay \$80 per head, and for a part \$85 per head. Two thousand one hundred dollars were paid in cash to release the mules that were in pledge in Lakeview, Oregon, which mules were a part of his purchase, and the balance of the purchase price was credited on the individual indebtedness of C. G. Alexander to plaintiff.

“(12) After the purchase of said mules they were driven to Tehama county, California, and delivered to the plaintiff.

“(13) After the sale of the said mules, and after they had been delivered to the plaintiff, defendant, in September, 1890, went to Oregon, and had an interview with C. G. Alexander, at which time he was informed of the sale of the mules to plaintiff, and also as to what disposition had been made of the proceeds.

“(14) Defendant, H. C. Wilson, then took a bill of sale from C. G. Alexander of all his interest in the stock on the Warner Valley ranch in part payment of a large indebtedness due him (defendant) from Alexander.

“(15) Upon his return to Tehama county soon after, defendant had an interview with his son, H. F. Wilson, in which, for the purpose of preventing H. F. Wilson from informing plaintiff that he (H. F. Wilson) had an interest in a part of the mules sold to him by Alexander, he (defendant) let H. F. Wilson have mules of his to satisfy him (H. F. Wilson) for the mules Alexander had sold, and thereby prevent his

(H. F. Wilson) saying to the plaintiff that Alexander had sold to plaintiff mules he had no authority or right to sell.

“(16) In November, 1890, defendant, at the request of plaintiff, gave to plaintiff a crop mortgage for the full amount of the note now being sued upon. After the execution of this mortgage defendant paid upon the said note as follows: July 11, 1891, \$320.62; August 26, 1891, \$1,833.05; December 26, 1891, \$3,592.66; in all, \$5,746.33.

“(17) June 5, 1891, defendant Wilson was again at Warner Valley, Oregon, and had an interview with C. G. Alexander, at which time Alexander gave to defendant a letter addressed to H. Kraft, in the following words and figures:

“ ‘Warner, June 5, 1891.

“ ‘H. Kraft:

“ ‘The mules I sold you last year, one-half of thirty-three head of “hearts,” sixteen and a half, and the thirty-one “bar-hearts,” I had no right to sell. Please turn them over to H. C. and H. F. Wilson.

“ ‘C. G. ALEXANDER.’

“In a few days thereafter defendant returned to Tehama county, where he then resided, and where he has resided for many years, bringing the above letter with him. He did not deliver it to plaintiff nor inform him of its contents, but kept it until a day or two before this case was commenced, to wit, until January 21, 1892, when he handed it to one of his attorneys, who afterward read it to Mr. Kraft.

“(18) On June 21, 1891, C. G. Alexander and the plaintiff, had a settlement, and on that day C. G. Alexander mailed to the plaintiff a new note for what he then owed the plaintiff. In arriving at the amount of this new note, what was agreed to be paid for the mules (less \$2,100) had been deducted from the total indebtedness of the said Alexander, and the note was sent for the balance. Alexander signed this new note, and on the twenty-second day of June, 1891, inclosed it in a letter, and it reached the plaintiff in due course of mail.

“(19) During the summer and fall of 1891 defendant continued to make payments on the note now in suit, and several times had the plaintiff's bookkeeper figure up the amount due. As late as November 14, 1891, plaintiff wrote to defendant about the balance then due on note in suit, and told him he was getting tired of waiting for his money. In response to

this letter, defendant came up and said he was not ready to sell the wheat. Prices were not high enough to suit. He would like to hold on a little longer. Had plaintiff's book-keeper figure up how much the wheat would bring at a certain price, and how much that note amounted to, and talked about turning over some wheat that Harry had as further security. He didn't say a word at that time about H. Kraft owing him anything for mules. Again, after the 28th of December, in response to another letter from the plaintiff, the defendant came up again. He told Kraft, the plaintiff, that Harry was going to let him have the wheat, and he was going to sell it, and pay the money in, and talked about some wool he had—something he was going to turn also. On December 26, 1891, the defendant sent to plaintiff wheat receipts amounting to \$3,599.66, for which he was given credit on the note in suit. This left a sum due to plaintiff from defendant, H. C. Wilson, much less in amount than the sum now claimed in the said defendant's counterclaim to be due from the said plaintiff to the said defendant.

“(20) At no time from August 9, 1890, to January 22, 1892, did defendant make any claim for the mules, or intimate that C. G. Alexander had done anything he did not have full authority to do.”

The foregoing are special findings, and are in addition to the general findings in the case in which it is found that Alexander had authority to sell the mules, etc.

From the findings, the court below concluded as matter of law “that the defendant, by his subsequent acts, conduct, and silence, as set forth in the above findings, has ratified the sale of all the mules sold by Alexander to the plaintiff, and should not now be permitted to question the validity of said sale.” The propriety of this conclusion involves the important question in the case. “Ratification is the adoption of a previously formed contract, notwithstanding a vice which rendered it relatively void; and, by the very nature of the act of ratification, confirmation, or affirmance, the party confirming becomes a party to the contract”: Herman on Estoppel, p. 1157. Where ratified by the principal, the unauthorized act of his agent is as binding upon him as though previous authority had been conferred upon such agent. The subsequent ratification has a retrospective effect, and is equivalent to a prior com-

mand. To say that an agent entered into a contract without authority from his principal, and that the principal subsequently ratified such contract, is, in legal intendment and effect, the equivalent of saying the agent was duly authorized to make the contract. The question of whether a contract made by an agent, or by one purporting to be such, has been ratified or adopted by the principal is one of fact, to be determined by a jury or by the court sitting in lieu thereof. Therein it differs from an estoppel in pais, which is a legal consequence—a right arising from acts or conduct: Bigelow on Estoppel, 4th ed., p. 447. A full knowledge by the principal of all the material facts is a prerequisite to a finding that such principal has by his silence, acts or declarations in fact adopted the contract: Wharton on Agency, sec. 65. The evidence which will authorize an assumption of ratification is or may be anything which convinces the mind of the intention on the part of the principal to adopt or approve the act, thus: (1) A principal who permits an unauthorized agent to act for him, and who stands by without interference while third persons deal with such agent as agent, cannot afterward dispute the authority of such agent. (2) Silence of the principal when informed that the agent has entered into obligations in his name indicates acquiescence. (3) Proof of ratification may be inferred. We may infer ratification when the acts and conduct of the principal are inconsistent with any other theory than that he intended to ratify the transaction. It may be said, generally, that any act, conduct or declaration from which an intent on the part of the principal to adopt the act of the agent appears is sufficient. Ratification being, as before stated, a fact, and the court having found thereon in favor of plaintiff, such finding must be upheld if supported by the evidence. The language of the general finding is "that said C. G. Alexander had authority to make said sale." The retrospective effect of a ratification is to place the contract and the contracting parties in the same position as though previous authority had been given; hence, if there was in fact proof of such ratification, the court was authorized to find the authority as stated in the finding.

Turning to the record, and we think the findings have substantial support in the evidence. Twelve of the mules purchased by plaintiff from Alexander were the property of the

latter, and no question can arise as to them. As to the thirty-three mules included in the same purchase, owned by defendant and Alexander jointly, there was certainly evidence tending to show that Alexander had authority to make the sale, and hence to support the finding of the court to that effect. That Alexander held a power of attorney from the defendant, authorizing him to transact all business at the ranch in Oregon, seems conceded. The precise date at which this power was revoked (if revoked at all by the defendant) is left in doubt. Alexander, testifying as a witness, says: "I thought I had authority from H. C. Wilson to sell to Kraft or to anyone else his half interest in the mules branded with the straight 'heart.' My opinion is based upon previous actions between us, and business matters. I had authority at one time so to sell—that is, up to three or four years ago—two years ago. It was a power of attorney to transact any and all business for him and in his name. It embraced everything, I supposed. Whether it embraced the stock or not, I do not know. It was a written authority. I have not the instrument. I had authority about eight years. It ceased about two years ago, when Mr. Wilson put that notice in the paper that he would not be responsible for any person in this county." Wilson himself testified that he published the notice in the paper after the sale of the mules to plaintiff. It is true, the extent of the authority under this power does not clearly appear, but, as I do not find that the defendant, who testified at length on his own behalf, and referred to the power, denies that it authorized a sale of stock, it is believed the court below was warranted in finding from all the circumstances that as to the mules branded with a "heart" Alexander had authority to sell. As to the mules branded with what is called a "bar-heart," and which were owned by defendant and his son, H. F. Wilson, no previous authority in Alexander to sell appears, and the sole question presented is as to the fact of ratification by the defendant, who is the assignee of his son, of all the interest of the latter therein. To discuss the testimony at length in support of the finding can subserve no useful purpose beyond the decision of the present case, and as the conclusion is irresistible that, although there is a substantial conflict in the testimony, there is yet such a showing in favor

of the ratification by defendant of the sale that this court is not warranted in disturbing the finding.

If, however, it be conceded that where one has wrongfully taken the property of another, and sold it, not as agent, but on his own account, mere silence on the part of the owner does not confirm the sale, and that the confirmation must rest upon some consideration upholding it, or upon an estoppel—a question upon which the authorities are divided—still the evidence and the special findings are, as it is believed, sufficient to uphold the judgment. It is not the silence alone of the defendant, relied upon, but the care which he took to prevent knowledge of the true state of the case from coming to the plaintiff; his payments made upon the promissory note, when, if he claimed what he now sets up as a counterclaim, there was nothing due thereon; his giving a chattel mortgage to secure the amount due upon the note; his silence for nearly a year and a half, with full knowledge of all the facts, coupled with his declarations to plaintiff, as disclosed by the evidence, that Alexander was perfectly good for the amount he owed the plaintiff, had plenty of property, etc., at a time when he, the defendant, had an assignment of all of Alexander's interests in the stock, whereby plaintiff was lulled into security, and to take a new note extending credit to Alexander; and other minor circumstances indicating an intention to abide by the action of his son in law in the sale which the latter had made. That the testimony as to some of these facts was conflicting does not authorize us to discard the findings. Taken together, they bring the case within the rule enunciated by the lord chancellor before the house of lords in *Cairncross v. Lorimer*, 7 Jur., N. S., 149, where he said: "I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct." Or, as was said in *Nicholson v. Hooper*, 4 Mylne & C. 179, by Lord Cottenham: "A party claiming a title in himself, but privy to the fact of another dealing with

the property as his own, will not be permitted to assert his own title against a title created by such other person, although he derives no benefit from the transaction." That defendant, in the face of the testimony to the numerous sales made by Alexander of stock from the ranch, was aware that the latter "was dealing with the property as his own," cannot be doubted. Plaintiff had previously purchased stock from Alexander under circumstances that may reasonably be assumed to have been known to the defendant, yet the latter offered no objection. Indeed, it appears from some of the testimony that defendant, his son and Alexander in many respects acted as ostensible partners in all the stock, and in other respects acted as though they were severally owners of it.

Numerous objections were made to the introduction of testimony and to the refusal of the court to permit questions to be answered, but I fail to see that any of the errors assigned to the rulings of the court in this respect are well founded. A large number of these exceptions are based upon the action of the court touching testimony going to show that defendant and Alexander were copartners in the stock and in the business of conducting the ranch. As the court did not find a partnership to exist between the parties, such exceptions become unimportant. The exception urged in the brief of appellant, founded upon the refusal of the court below to permit defendant to testify as to how the account stood between Alexander and himself after witness received an assignment of Alexander's interest in the stock, is of no moment, for the reason that in answer to the very next question defendant was permitted to answer that the stock assigned to him did not pay his demand against Alexander by \$30,000. So, too, the objection that defendant was not permitted to testify that his only knowledge of the sale was that Alexander had sold the stock as his own, and not as agent for defendant, was immaterial, for the reason that all the testimony tended to show that, whatever the authority of Alexander may have been as to a portion of the stock sold, he in fact sold it in his own name, and not in the name of or as the agent of defendant; and there is nothing in the findings in conflict therewith. There are other exceptions to evidence, but they are of no

greater moment than those noticed, and need not be reviewed. The judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

TODD v. MARTIN.

No. 18,307; September 17, 1894.

37 Pac. 872.

Appeal—Conflicting Evidence.—A Verdict Rendered on conflicting evidence will not be disturbed.

Estate of Decedent—Services of Nurse.—Evidence Showing that services were rendered by one as nurse to deceased is sufficient to charge the estate therefor, without proof of an express request by deceased.

Estate of Decedent—Services as Charge.—Where plaintiff, after the death of deceased, continued in his former work of taking care of the latter's stables and stock without any authority from the administratrix, such services form a charge of necessity on the estate.¹

Estate of Decedent.—Expenses Incurred by the Widow Before she was appointed administratrix, and not apparently for the benefit of the estate, are not chargeable against it.

Witnesses—Claim Against Decedent.—Code of Civil Procedure, section 1880, disqualifies parties or assignors of parties to an action against an executor or administrator, or persons in whose behalf such action is prosecuted on a claim against the estate of the deceased, from testifying as to facts occurring before the death of the deceased. Held, that the disqualification applies only to those parties who assert claims against the estate.

¹ Cited with approval in *Re Murray's Estate*, 56 Or. 137, 107 Pac. 21, where it was held valid for the heir to anticipate administration in expressly retaining in service the old keeper of a valuable stallion belonging to the estate. The court said: "He was entitled to compensation from Emma Murray for the value of his services, and she was entitled to be reimbursed therefor out of the estate by the administrator when appointed."

Administrator—Action Against—Witnesses.—Code of Civil Procedure, section 2049, provides that the party producing a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and show former inconsistent statements. Held, that the plaintiff in an action against an administratrix, having called her to testify in his behalf, is not necessarily bound by her answer.

Administrator—Action Against—Witnesses.—In an Action Against an administratrix for services as nurse to deceased, one who served in the same capacity alternately with plaintiff may testify as to the nature and amount of the services.

APPEAL from Superior Court, Trinity County; T. E. Jones, Judge.

Action by E. N. Todd against Isabell J. Martin, administratrix of the estate of John Martin, deceased, to recover for services as nurse to the deceased in his last illness, and for other services. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter H. Linforth for appellant; James W. Bartlett for respondent.

HAYNES, C.—The defendant appeals from the judgment entered against her upon the judgment-roll and a bill of exceptions setting out the evidence. A demurrer to the complaint was overruled. No point is made thereon in appellant's brief, and, as the complaint states a cause of action, the other objections raised need not be noticed. The claim consisted of several items, aggregating \$876.66, and stated several credits, leaving an alleged balance due plaintiff of \$368.16, and was allowed by the administratrix, upon presentation, for the sum of \$57.08. The jury returned a verdict for \$361.16, upon which judgment was entered for plaintiff. Appellant reserved a large number of exceptions to evidence, and also specifies particulars wherein the verdict is not justified by the evidence. The sufficiency of the evidence will be first considered.

1. The first item in plaintiff's claim is for the sum of \$93, alleged to have been given by the plaintiff to John Martin in May, 1891, to be placed in his safe for safekeeping. There was evidence from which the jury would be justified in find-

ing the delivery of the money to Martin, and that it was put in the safe. There was also evidence tending to prove that on February 5, 1892, the money had not been returned to plaintiff. When delivered to Martin, the money was in a purse, according to the testimony of Mr. Everhart, and was counted by Martin; and that on February 5, 1892, he, Everhart, heard Mr. Martin say to plaintiff that he was going below, to be gone some time, and asked Todd whether he wanted his purse, to which Todd replied that he did not. Mr. Martin died July 30, 1892. On August 17th, Mr. Spratt, the public administrator, took charge of the estate, and opened the safe, but did not find any purse containing money; that he found an empty leather bag, which was neither marked nor tagged. John Hewston, who had been in Martin's employ for about fifteen years, testified that he knew of Martin's custom with reference to keeping money and packages in his safe for others; that he had frequently kept money for him; but that it was his invariable custom to tag or label all money, packages or purses belonging to others with their names upon them. A period of nearly seven months elapsed after the conversation in relation to the purse, testified to by Everhart, before the death of Martin, during which the plaintiff had almost daily opportunities of receiving back his purse. On the other hand, plaintiff, during all the time after the deposit, was in the employ of Martin at a salary of \$50 per month, and it does not appear that at any time he was in need of money beyond that which he received for his labor. Whatever may be our opinion as to the weight of evidence, we think the evidence was such as to require its submission to the jury, and that this court should not disturb the verdict thereon.

2. As to the amount of credits defendant was entitled to on plaintiff's account for services, the testimony was conflicting to such an extent that we are not permitted to say that upon that point the verdict is not justified by the evidence.

3. It is contended that there is no evidence tending to establish the fact that plaintiff rendered "fifteen days' service, or any number of days' services, to John Martin, as a nurse, at his request." Inasmuch as defendant admitted that plaintiff did serve as a nurse for John Martin for five days during his last illness, we infer that counsel for appellant bases the

alleged insufficiency of the evidence upon the absence of direct evidence of a request by John Martin. We think the evidence was sufficient in both particulars. It is not necessary that there should be direct evidence of an express request. The fact that he was called from his regular employment at the livery-stable, and devoted his time to the care of Mr. Martin, with his knowledge and that of his wife and the attending physician, is sufficient to show a request. Or, if Mr. Martin had been unconscious, the request of the wife or the physician would have been deemed his request.

4. One item in plaintiff's claim is for seventeen days' services at the stable, from August 1st to the 17th, which was after the death of Mr. Martin. It is objected that these services were not shown to have been rendered "at the request of Mrs. Martin, as administratrix of the deceased." The facts were that, prior to his death, the deceased conducted a livery-stable, and plaintiff was employed therein for a year or more at a compensation of \$50 per month. From the time of Martin's death until August 17th, there was no administrator or other person legally authorized to take charge of the estate, or to employ anyone in any service connected therewith. It could not have been the duty of the plaintiff, in view of his past employment by Mr. Martin in that service, to have ceased to care for the property, or permit the horses to die of hunger or thirst. Services of this character so rendered prior to the appointment of an administrator must be deemed to have been included in the term of service contracted for by the deceased, and to form a proper charge against the estate; or, if it cannot be placed upon that ground, it is, while not a debt either of the intestate or the administrator, a charge thrown upon the assets by necessity, but for which the administratrix subsequently appointed would not be personally liable. It is analogous to a claim for funeral expenses paid by a person other than the administrator or executor, which, at common law, are a charge against the estate, though not strictly a debt due from the decedent. In *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384, the defendant in an action upon an obligation made to the deceased, but payable to the executor, was permitted to set off the funeral expenses of the deceased paid by the defendant. In *Hapgood v. Houghton*, 10 Pick. (Mass.) 154, it was held that the law raises a promise on the

part of the executor or administrator to pay for the funeral expenses as far as he has assets, and that if he have no assets he should plead that fact in bar, and that if he has, the judgment must be against them in his hands. Humanity, as well as the interests of the estate, required that the stock be cared for, and no one could more appropriately assume that duty than one who had been employed by the decedent in his lifetime to perform the same service; and as to the value of the services, that compensation which had been paid plaintiff by the decedent will be deemed reasonable; and as to services rendered after the death of Mr. Martin, plaintiff is a competent witness.

The item in plaintiff's claim for the sum of \$5 of plaintiff's money, expended in making a trip to Redding and return at the request of Mrs. Martin, August 6, 1892, for the purpose of bringing Henry Martin to Weaverville, is not a charge for which the estate is liable. Mrs. Martin was not then administratrix, nor does the service appear to have been for the benefit of the estate, and no evidence should have been received in regard thereto. It is clear, however, that this item was disallowed by the jury. This item was for \$5. There was another item for \$2 for "cash paid Lewis Moore, in change." The least of the remaining four items was \$28.33. No evidence was given as to the \$2 item. The verdict was for \$361.16, while the amount claimed was \$368.16, the difference being the amount of this and the \$2 item above named. The error did not, therefore, prejudice the defendant.

Plaintiff called the defendant as a witness, and asked her to give the dates and items of the cash payments made to the plaintiff between the first day of June, 1891, and the 15th of August, 1892. Counsel for defendant objected, on the ground of incompetency, under subdivision 3 of section 1880 of the Code of Civil Procedure, and the objection was overruled. Defendant thereupon, as such witness for the plaintiff, was permitted, over the objection of defendant, to testify from the books of the deceased to the several items of payments referred to in the question. Section 1880 of the Code of Civil Procedure provides: "The following persons cannot be witnesses: 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator

upon a claim, or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." This section has been several times considered by the court, but never under precisely the circumstances here existing. We think, however, that in *Chase v. Evoy*, 51 Cal. 618, a construction was given which may fairly be held to include this case. There the action was against the administratrix upon a claim against the estate, the claim consisting of a promissory note made by the decedent and two others, who were also defendants. The administratrix of the deceased maker called one of her codefendants, and proposed to prove by him "what, if anything, had been paid thereon, and how paid." This court, after saying that the language of the statute, if literally construed, might exclude all parties to the action, whether called to testify for or against the estate, but that to give it such construction would defeat the manifest purpose of the act, and that the language was capable of a different construction, further said: "Parties to the action, or in whose behalf it is prosecuted, are not allowed to testify against the estate in a suit to establish a demand against it. One of the parties to the transaction out of which the demand originated being no longer in esse, it was deemed unwise to permit the other party to testify to his version of the demand when called by the plaintiff in a proceeding to establish the demand. The statute, it is true, provides in general terms that 'the parties to an action or proceeding' against the estate shall not testify, but the obvious meaning of this provision is that a party to the action shall not testify against the executor or administrator." We think it could not have been the intention of the legislature to render incompetent as a witness in such cases the executor or administrator who is charged with the duty of protecting the estate against improper or unjust demands, as in many cases it would tie his hands, and operate to prevent his giving efficient protection, and compel him to stand by with lips sealed, and see the estate despoiled, when, if permitted to speak, the fraudulent or unjust character of the claim would be exposed and defeated. Nor do we think the language of the code inconsistent with such construction, but, on the contrary, that its manifest intent and purpose require it. We think it is only parties who assert claims against an estate who are rendered

incompetent to testify, and that the word "parties" does not refer to the executor or administrator who is the party defendant. If, however, the executor or administrator is the assignor of the claim asserted by the plaintiff, or is a person for whose benefit it is prosecuted, or himself asserts a claim, as he may do, the other language of the section is sufficient either to fix him as the party prosecuting the claim, or as the person for whose benefit it is prosecuted, and upon that ground declare him incompetent, but does not do so simply because he is the party defendant. In *Blood v. Fairbanks*, 50 Cal. 420, it is true, it was said that all parties to the action were incompetent. But in that case it was not necessary to decide that question. Hewitt had assigned to Blood his interest in the contract, but for some reason he was made a party to the action, though, as he had no interest, he was merely a nominal party. He was held to be incompetent as a witness, because he was a party. But he would have been incompetent if he had not been a party, for the reason that he was an assignor of the plaintiff, and so within the express letter of the statute. In the case at bar we see no reason why the defendant was not a competent witness, and, being competent, because not within any of the grounds mentioned in the code rendering her incompetent, the plaintiff had the right to call her as his witness.

Plaintiff was asked whether he had a conversation with Mrs. Martin, after the death of Mr. Martin, relative to the purse alleged to have been placed in the safe. The objection made by defendant was properly overruled. The question did not call for the conversation, and the conversation itself might have been of a character to make it relevant and competent. The conversation, as afterward given by the witness, was unimportant; but, if it was not competent, there was no motion to strike it out.

The testimony of J. C. Todd is relevant so far as it shows the opportunity his employment as nurse gave him of knowing of the services of the plaintiff in the same capacity, and the character of the services required as a nurse in that case. The fact that plaintiff came in the evening and assumed the duties of nurse, and that the witness found him there in the morning when he returned, was evidence from which the jury could properly infer, in the absence of evidence to the con-

trary, that plaintiff was on duty all night; and defendant's motion to strike out the testimony of the witness was properly denied.

As to appellant's contention that respondent, having called Mrs. Martin as a witness, is bound by her answers, it is sufficient to say that section 2049 of the Code of Civil Procedure, lays down a different rule. The instruction given to the jury upon this point at defendant's request was not accurate, but was evidently not understood, either by the court or jury, to mean what counsel now contends it means. The court certainly did not understand by the words, "the plaintiff is bound by the testimony of the defendant given by her while a witness on his own behalf," more than is expressed in the section of the code above cited. Besides, this instruction must be taken in connection with others requested by the defendant, to the effect that the jury were the exclusive judges of the evidence, and that they might "reject the most positive testimony of a witness."

The modifications of defendant's requests to instruct the jury were proper, and the instructions refused were properly refused. These modifications and refusals, so far as they represent any question of importance, fall within points already discussed, and need not be further noticed.

Finding no error which requires a reversal, we advise that the judgment be affirmed.

We concur: Vanelief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

FETTE v. LANE.

No. 18,264; September 21, 1894.

37 Pac. 914.

Mortgage on Crops—Notice of Prior Mortgage.—Plaintiff took a mortgage on certain crops as security for a loan, and subsequently defendant took a mortgage on the same crop for seed furnished, and to secure future advances. Plaintiff's mortgage was not recorded. Held, that a finding, on conflicting evidence, that defendant had notice of plaintiff's mortgage before making the advances on the second mortgage, would not be disturbed.

Chattel Mortgage.—An Unrecorded Mortgage of Personal property is valid against a subsequent mortgagee with notice.¹

Mortgage of Crops—Prior Unrecorded Mortgage.—Where defendant's second mortgage for seed furnished was made before he had notice of plaintiff's prior unrecorded mortgage on the same crops, defendant has a prior lien to the extent of the seed furnished, but cannot enforce against the plaintiff liens for advances furnished the mortgagor after notice of the first mortgage.

Mortgage of Crops.—In an Action by the First Mortgagee of crops to recover the amount of his lien from a second mortgagee, who has sold them, one of the mortgagors may testify as to a statement by plaintiff that it was understood that the crops should be sent to defendant subject to plaintiff's lien, in order to rebut an allegation that plaintiff had surrendered his lien.

Mortgage of Crops.—A Finding That Barley Subject to Mortgages to plaintiff and defendant was to be stored by defendant in plaintiff's name, that he stored it in his own name, that plaintiff's demand of enough to secure his claim was not complied with, and that the barley was sold by defendant, and the proceeds retained by him, shows a conversion of the barley.

APPEAL from Superior Court, San Joaquin County; Ansel Smith, Judge.

Action by F. Fette against Frank E. Lane to recover on a note secured by mortgage on crops sold by defendant under a second mortgage. Judgment for plaintiff and defendant appeals. Affirmed.

¹ Cited in Cardenas v. Miller, 108 Cal. 252, 49 Am. St. Rep. 84, 41 Pac. 472, where the legal attitude of a creditor is distinguished from that of a mortgagee in such a situation.

James H. & John E. Budd and Thompson & Paulsell for appellant; Nicol & Orr for respondent.

HAYNES, C.—This action was tried by the court. The findings, briefly stated, disclose the following facts: On March 31, 1892, O'Brien and Smith were indebted to plaintiff in the sum of \$564, and on that day executed to him their promissory note for that sum, payable August 1, 1892, with interest, and on the same day executed to the plaintiff a "crop mortgage" to secure the same, upon a crop of barley then growing on lands therein described. Prior to that time O'Brien and Smith procured from defendant the seed for said crop, amounting to three hundred and thirty sacks, under an agreement to return two sacks of barley for each sack of seed; and on May 21, 1892, O'Brien and Smith executed to defendant a crop mortgage on the same crop previously mortgaged to plaintiff to secure to defendant the return of said two sacks for each one so furnished, and for the payment of such sums of money as defendant might advance to them, not exceeding \$100. This mortgage further provided that the mortgagors were to care for and protect the crop while growing, and, when fit for harvesting, to harvest, thresh, clean and sack the same, and deliver it to the mortgagee, to be by him held and disposed of for the payment of the moneys thereby secured; and in default of either of said acts the mortgagee was authorized to enter and take possession and harvest, thresh and sack the same, and all expenses so incurred, including hauling, storing and delivery, were to be secured by the mortgage, and first paid; and for all these purposes the mortgagee was constituted the attorney in fact of the mortgagors, with power to sell and dispose of the same at such times and for such sums as he might deem proper. This mortgage was duly recorded on the day of its execution, but the prior mortgage to plaintiff was not recorded. It was further found by the court that, after the execution of the mortgage to the defendant, but before any advances or expenditures were made thereunder, the defendant was informed of the prior mortgage to the plaintiff; that, subsequent to the execution of said mortgage to defendant, and prior to the harvesting of the crop, it was agreed between plaintiff and defendant that when the crop should be harvested and sacked the whole of it should

be shipped to defendant at Stockton, and be by him stored in the name of the plaintiff, and held for the satisfaction of plaintiff's said claim; that with the consent of O'Brien and Smith the whole of the crop, amounting to four thousand five hundred and twenty-five sacks, was shipped to defendant, who stored the same in his own name; that thereafter plaintiff demanded that defendant turn over to him so much thereof as was necessary to secure the note held by plaintiff, but defendant refused to do so, and thereafter sold at private sale the whole thereof, amounting to \$3,468.77, and received and appropriated the whole thereof to his own use; that no proceedings were taken to foreclose said mortgage, nor any notice of sale given; that the money so received by defendant was largely in excess of the sums due under both said mortgages and all sums expended in harvesting the barley, and that no part of plaintiff's note against O'Brien and Smith had been paid. One or two other facts found by the court will be noticed in another connection. Upon these findings judgment was entered for plaintiff for the amount due on said note, and the defendant appeals therefrom, and from an order denying his motion for a new trial.

The questions principally discussed are as to the sufficiency of the evidence to justify the findings. It could serve no useful purpose to discuss the evidence in detail. A few points only can be noticed. The finding that defendant had knowledge of plaintiff's mortgage before he made any advances or expenditures on account of the mortgaged property is justified by the evidence. The evidence is clear that he had such knowledge, but as to the precise time when such knowledge was obtained the evidence is conflicting. The finding of the court, therefore, cannot be disturbed.

That defendant made large advances to O'Brien and Smith, which he was not required to make under the terms of his mortgage, and which were not secured by it, even if plaintiff's mortgage had never existed, is clear from defendant's testimony. He said: "Smith and O'Brien's account had exceeded the amount of my mortgage to such an extent that I thought I ought to be secure, and so attached the crop." The amount for which the attachment was issued appears from defendant's testimony to have been \$1,236, and the evidence is sufficient to sustain the finding that he received from the sales of the

barley a sum of money largely in excess of the amounts secured by both mortgages. No judgment was taken in the attachment proceeding, and, after the barley was all delivered to defendant, the attachment was dismissed. Plaintiff claimed, and the court found, that an agreement was made between plaintiff and defendant to the effect that defendant should receive all the barley, and store it in plaintiff's name, to the end that his claim should be paid, thus giving defendant the opportunity of applying the remainder to the payment of his claim, this arrangement being assented to by Smith and O'Brien. Appellant contends that this finding is not supported by the evidence, but that, on the contrary, plaintiff agreed to take the barley, and pay defendant \$1,700, and further to guarantee the payment of the harvesting expenses. The evidence shows that there were negotiations looking to the arrangement last above stated, but the two propositions appear to have been under consideration at the same time. That plaintiff made the offer to pay the \$1,700 is conceded by him, but plaintiff wanted the barley stored at Sperry's warehouse; that, if it was not stored there, he was afraid he should have to pay storage twice; and the conclusion seems to have been arrived at which is stated in the finding of the court. The plaintiff testified further that he left his note and mortgage with defendant for collection, and that defendant told him to come "in a couple of days," and get his money; while defendant testified that he never agreed to assume plaintiff's obligation against Smith and O'Brien, "only that when I was paid he should be paid." It would be idle for us to attempt to reconcile these conflicts, and, not being able to do so, we cannot disturb the findings.

Appellant's counsel say in their brief that "the amount secured to Lane [the defendant] by the mortgage, exclusive of the insurance money, was \$3,474.96, and the amount of sales \$3,468.77, so that the amount received from sales was insufficient to pay the amount secured to be paid exclusive of insurance." The sum above stated is the entire indebtedness of O'Brien and Smith to defendant, except the insurance, and includes \$1,236, which appears from the testimony of defendant to have been the amount for which the attachment was issued. As the attachment could not issue without an affidavit that the amount claimed was not secured by a mortgage or

other lien, the defendant cannot well insist that his whole claim is secured by his mortgage.

It is also insisted by appellant that, as plaintiff's mortgage was not recorded, it is void as against creditors and subsequent purchasers and encumbrancers in good faith and for value. Civil Code, section 1217, provides: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." "The object to be attained by requiring the recording of mortgages of personal property is the same as that in providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case": *Berson v. Nunan*, 63 Cal. 552.

As to the barley furnished by defendant for seed, defendant's subsequent mortgage, taken without notice of the prior unrecorded mortgage, is entitled to the first lien. It is not necessary to consider how far, and as to what expenditures, made after knowledge of plaintiff's mortgage, defendant's mortgage may be held to constitute a prior lien, since the mortgaged property exceeds the amount secured to both plaintiff and defendant under their respective mortgages, and hence the question of priority is unimportant. Nor could the attachment of the property by defendant, after notice of plaintiff's mortgage, affect his lien, even if the attachment had not been dismissed; but, if it were otherwise, the attachment having been discharged, no lien remained except those created by the mortgage. For the purposes of this decision it may be conceded that plaintiff expended nothing in harvesting the crop, and that defendant paid all the expenses, and that the expenses of harvesting and storing the crop were a prior lien under defendant's mortgage, for the result reached by the trial court would still be right, inasmuch as the other advances not required by the mortgage, and included in the attachment, are more than sufficient to satisfy plaintiff's lien.

As to the manner in which the barley was sold, we think the plaintiff does not stand in a position to question it. If enough had not been realized to satisfy plaintiff's lien after satisfying such part of defendant's lien as was prior to his, the question might be material. Both liens having been satisfied, the only parties interested in that question are Smith and O'Brien, and they are not in court. A discussion of the question is, therefore, not only unnecessary, but improper.

Smith, one of the mortgagors, called by plaintiff, was asked whether he, O'Brien, Fette and Lane had an understanding as to how and to whom the grain should be shipped. The witness answered: "Yes, sir. We had an understanding. Mr. Fette told me he had an understanding with Mr. Lane." Defendant objected to what Fette told the witness unless Lane was present. Counsel for plaintiff then stated they did not offer it to bind Mr. Lane, but to meet an allegation of a surrender of plaintiff's lien. The court overruled the objection, and the witness said: "We didn't have an understanding with Mr. Lane—at least I didn't—how to ship it. All the understanding I had was, Mr. Fette told me that he had an understanding with Mr. Lane to ship the barley to Mr. Lane in Mr. Fette's name." We think the evidence was competent for the purpose for which it was introduced, and that the court properly refused a motion to strike it out. It was not evidence against Lane to show that he had assented or agreed that the barley should be shipped or stored in plaintiff's name, but was competent to show that Fette still claimed a right under his mortgage, and had not, as was alleged, abandoned his lien.

It is also contended that there was no conversion by defendant. But the finding that the barley was to be stored by defendant in plaintiff's name, that he stored it in his own name, that plaintiff demanded a delivery of so much thereof as would secure his claim, that such demand was not complied with, and that defendant sold the barley and retained the proceeds, comes so near to showing a conversion that Chitty could not have discovered the difference. Counsel's contention, if based on their construction of the evidence, as was doubtless intended, might lead to a different conclusion.

After a careful review of the evidence and the arguments of counsel, it must be said that, wherein there is any doubt of the correctness of any of the findings, the testimony is so conflicting that they must be permitted to stand. Nor can we even say that upon the evidence we would have made different findings. We advise that the judgment and order appealed from be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

IN RE WALKERLY'S ESTATE.

No. 15,794; September 25, 1894.

37 Pac. 893.

Appeal—Failure to File Transcript.—An Appeal will not be Dismissed because of the failure to file a printed transcript of the record in time, where an application is pending to settle the bill of exceptions.

Appeal—Notice—Service Too Late.—As No Appeal is Instituted by the service of a notice of appeal after the time to appeal has expired, an order will not be made dismissing such an attempted appeal.

APPEAL from Superior Court, Alameda County; W. E. Greene, Judge.

Accounting by the executors of the will of William Walk-erly. Motion to dismiss two appeals. Motion denied.

B. B. Newman for appellant; Rogers & Paterson for the widow; H. C. Firebaugh for respondent; F. G. Whitney for certain beneficiaries.

BEATTY, C. J.—These are motions to dismiss two appeals—one from a decree or order settling the accounts of the executors supplemental to their final account and distributing the estate, which was made and entered November 27, 1893; the other an attempted appeal from an order settling the final account of the executors, which was made and entered in August, 1892. The motion to dismiss the first-mentioned appeal is based upon the alleged failure of the appellants to file a printed transcript of the record in time, and is overruled because it appears that an application to settle a bill of exceptions to the said order is pending: See *Walkerly v. Greene* (No. 15,712, just decided), 104 Cal. 208, 37 Pac. 890. The other motion to dismiss is also overruled, but solely on the ground that there is no such appeal, the notice having been given long after the time to appeal had expired.

We concur: Van Fleet, J.; McFarland, J.; De Haven, J.; Fitzgerald, J.

WOLFF v. WOLFF.

No. 15,417; September 26, 1894.

37 Pac. 858.

Divorce—Alimony—Printing and Counsel Fees.—An order by the judge who tried a divorce case, granting \$100 printer's fees and \$250 counsel fee on a pending appeal from a judgment in favor of the wife, and a contemplated appeal from an order denying a new trial, will not be reversed as excessive.

Divorce—Order for Counsel Fee on Appeal.—In an action for divorce, an order granting a counsel fee for an appeal from an order denying a new trial, made before such appeal is taken, will not be reversed as premature where, on the hearing of the appeal from the order granting such allowance, it appears that an appeal from the order denying a new trial is pending.

APPEAL from Superior Court, City and County of San Francisco; Charles W. Slack, Judge.

Action for divorce by Lillie Wolff against Henry Wolff. From an order granting an allowance for counsel fees and disbursements, defendant appeals. Affirmed.

Fox & Kellogg for appellant; W. H. L. Barnes (W. W. Foote of counsel) for respondent.

PER CURIAM.—This is an appeal from an order made after judgment in a divorce case allowing alimony. The affidavit, among other things, states that the case has been tried, and judgment rendered for plaintiff; that an appeal had already been taken from the judgment, and a motion for a new trial had been made and denied; and that defendant contemplated an appeal from such order. Thereupon, the court allowed as alimony for the two appeals: For printing, \$100; for counsel fees, \$250. The affidavit also shows that, although alimony had been previously allowed to the amount of \$1,700, only \$250 had been paid; that plaintiff was destitute of means. It is contended that the allowance is excessive, but we cannot so conclude. The judge who made the order had tried the case, and was fully aware of the nature of the controversy.

How much printing would be required would depend upon this. It would have been more prudent to forbear making an allowance for the second appeal until after it had been taken, but our records show that the appeal from the order denying a new trial was taken afterward. We do not think the order should be reversed because the provision for this was premature. The order is affirmed.

SMITH v. FRATT et al.

No. 18,274; September 29, 1894.

37 Pac. 1033.

Preference by Insolvent—Suit to Set Aside.—In an action by an assignee in insolvency to recover the value of property transferred by an insolvent debtor to defendants, findings that defendants neither knew nor believed, nor had reasonable cause to believe, that the debtor was insolvent, or made the deed in contemplation of insolvency, are sufficient to support a judgment for defendants.

APPEAL from Superior Court, Sacramento County; W. C. Van Fleet, Judge.

Action by S. B. Smith, assignee, against F. W. Fratt and George F. Parker, to recover the value of property conveyed to the defendants before the assignment. Judgment for defendants, and plaintiff appeals. Affirmed.

D. E. Alexander, Albert M. Johnson and Johnson, Johnson & Johnson for appellant; Denson & Oatman, George A. Blanchard, L. S. Taylor and S. Solon Hall for respondents.

PER CURIAM.—In January, 1887, James S. Meredith was adjudged to be an insolvent debtor, on petition of his creditors; and thereafter S. B. Smith, the plaintiff herein, was duly elected and appointed assignee of his estate. Smith qualified as such assignee, and the clerk of the court, by an instrument in writing, assigned and conveyed to him all the estate, real and personal, of the debtor. Afterward Smith, as

such assignee, commenced this action to recover from the defendants the value of a stock of drugs and medicines alleged to have been sold and transferred to them by Meredith on December 9, 1886. The action was based upon the theory that, at the time of the transfer, Meredith was insolvent, and that it was made with a view on his part to give a preference to the defendants, who were then his creditors, and to prevent the property from coming to his assignee in insolvency, and being distributed ratably among his creditors, and that defendants, when they accepted the transfer, had reasonable cause to believe that he was insolvent, and that the transfer was made with a view to prevent his property from coming to his assignee in insolvency, and being distributed ratably among his creditors. The court found: That, at the time of the transfer, Meredith was indebted to Fratt, but not to Parker. That Meredith did not sell or deliver to Fratt the property described in the complaint, or any part thereof. That the transfer was made to Parker upon certain terms and conditions stated, and Meredith was at that time insolvent, and it was his desire to pay his debt due to Fratt in preference to other creditors, because it had been created in the purchase of this same stock of goods; "but neither Parker nor Fratt knew or believed that said Meredith was insolvent, nor did they or either of them believe, nor had either of them reasonable cause to believe, that Meredith entered into this agreement in contemplation of insolvency, or with the view of making Fratt a preferred creditor." "The defendant Parker did not purchase nor receive the transfer of said goods with the intention of giving or securing to Fratt any preference over other creditors of said Meredith, nor with intent to prevent said property from coming into the hands of the assignee of said Meredith, nor with intent to prevent the same from being distributed ratably among his creditors." Judgment was accordingly entered that the plaintiff take nothing by his action, from which, and from an order denying his motion for a new trial, the plaintiff appeals.

Three points are made for a reversal: (1) The insufficiency of the evidence to support the findings; (2) error of law in excluding certain testimony; (3) the insufficiency of the findings to support the judgment.

The first point relied upon cannot be sustained. The record shows that there was evidence sufficient to justify and support each of the findings assailed. Under the well-settled rules of this court, therefore, the judgment cannot be disturbed on this ground.

Only one error of law is complained of. When Meredith was being examined as a witness, he was asked by counsel for plaintiff, "Whom did you intend to benefit in making that transfer?" The question was objected to and excluded by the court on the ground that it called for an opinion of the witness and was incompetent. Now, conceding that the ruling was erroneous, still we fail to see how the plaintiff was or could have been in any way prejudiced by it. The evident purpose of the question was to prove by the witness that he intended to benefit Fratt by the transfer, and in effect the court found that this was his intention. If, therefore, the question had been answered, the plaintiff's case would not have been strengthened.

The third point does not require any extended notice. The action was brought to recover the value of property alleged to have been transferred in violation of the provisions of section 55 of the insolvent act. That section provides that a transfer is void, and an assignee may recover the value of the property, when the person receiving such transfer, or to be benefited thereby, has reasonable cause to believe that the person making it is insolvent, and that such transfer is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors. The findings here clearly negative the fact that either Fratt or Parker believed, or had reasonable cause to believe, that Meredith was insolvent when he made the transfer, or that it was made with a view to prevent the property from coming to his assignee, or being distributed ratably among his creditors. This being so, the findings were sufficient to show that the plaintiff had no cause of action, and to support the judgment. It follows that the judgment and order appealed from must be affirmed, and it is so ordered.

RICHARD v. HUPP.

No. 18,259; September 29, 1894.

37 Pac. 920.

Easement—Plaintiff Constructed a Flume Five Hundred and Sixty-four Feet long in the bed of a stream to convey the water from his mine. The flume extended four hundred feet on land below, owned by defendant. Eighteen years later, defendant built a dam across the stream, causing the water to flow back, but not further than the limit of his land. Held, in an action to abate the dam as a nuisance, there being evidence that the flume was built as an adjunct to plaintiff's quartz-mill, that evidence that the mill was no longer in operation, and that its condition for many years had been such that it could not be used, was admissible to show an abandonment of any prescriptive easement which plaintiff may have had over defendant's land.

Easement.—To Establish a Prescriptive Right to an easement, the user must have been continuous, adverse, under claim of title, and with the knowledge and acquiescence of the owner of the servient estate.

Pleading.—The Refusal of a Motion to Amend the Complaint, made after the decision in the case was rendered, to conform with evidence that the erection of the dam by defendant obstructed the flow of debris and tailings from mines above plaintiff's land, was within the discretion of the trial court.¹

APPEAL from Superior Court, Butte County; E. A. Davis, Judge.

Action by Joseph Richard against John Hupp to abate a nuisance caused by the erection of a dam by defendant flooding plaintiff's mines. Judgment for defendant. Plaintiff appeals. Affirmed.

John Gale for appellant; Warren Sexton and F. C. Lusk for respondent.

¹ Cited and followed in *Grand Central Min. Co. v. Mammoth Min. Co.*, 29 Utah, 597, 83 Pac. 685, the court quoting the language of Judge White in *Warner v. Godfrey*, 186 U. S. 365, 46 L. Ed. 1203, as to the injustice a contrary rule would work the defendant in a case persistently litigated for years, upon which matter he has expended time and money only to be deprived of the fruits of a successful resistance at last.

SEARLS, C.—This is an action to abate a nuisance averred to have been caused by the erection of a dam by defendant across a watercourse in Butte county, known as “Little Butte creek,” whereby the water of said creek is caused to flow back upon and submerge the quartz mining claim of plaintiff. The cause was tried by the court, without the intervention of a jury, and written findings filed, upon which judgment was entered in favor of defendant for costs. Plaintiff appeals from the judgment and from an order denying his motion for a new trial. Plaintiff, who is appellant here, is, and he and his grantors have been, the owners of and in possession of a quartz mining claim situate and being in section 36, township 24 north, range 3 east, Mount Diablo meridian. Plaintiff and his co-owners, in 1870 and 1871, constructed a flume running from said mine about five hundred and sixty-four feet down the bed of Little Butte creek. Said flume was built in the bottom of a rock cut from two to five feet deep, and the top of the rock cut was from three to six feet below the natural bed of the creek. All of said flume, except one hundred and sixty feet of the upper end thereof, is upon land owned by the defendant. The flume was used by plaintiff and his co-owners to convey water from their mine, and to some extent for placer mining. The mill of plaintiff has not been used since 1873, and the mill has gone to decay. In 1881, third parties, who had a bond from plaintiff, pumped out the mine, and took out some quartz, but, so far as appears, did not work it. The flume went to decay, and, as the court found, nothing is left of it but the ruins in the bed of the rock cut. Defendant is the owner in fee simple of the northwest quarter of section 1 in township 32 north, of range 3 east, Mount Diablo meridian, under a pre-emption settlement and entry made in 1868, and a United States patent issued in 1871 to one Nelson, the grantor of said defendant. There is also evidence and a finding as to the ownership by the defendant of a mining claim on the creek between his patented land and the lower or south line of plaintiff’s quartz claim, the ownership of which, however, is unimportant to the decision of the case. In 1888 defendant constructed a dam across the creek upon his patented land, about six hundred feet below plaintiff’s mining claim, and a short distance below certain falls in the creek, for the

purpose of diverting the water of the stream for mining and irrigation. The dam so constructed by the defendant is about three feet higher than the crest of the falls, and sets the water back in the stream, but does not overflow or set the water back above defendant's own land, or upon or over the mining claim of plaintiff, or injure it in any manner. That the water so set back overflows a portion of the rock cut in which plaintiff's flume was constructed, but such portion is upon defendant's patented land; and that plaintiff is not the owner thereof, and has no easement in defendant's land, or right to use the same for the purpose of maintaining a flume thereon. The findings are quite full upon all the issues, and are only stated to the extent deemed necessary to an understanding and elucidation of the points made by appellant. At the trial, objection was made by appellant to testimony tending to show the condition of his mine; that it had not been worked since 1873; that the mill building had fallen down; the flume which carried water to the wheel had disappeared; that the wheel and machinery had gone to decay, etc.—which objection was overruled, an exception taken, and the ruling is assigned as error.

The theory of appellant is that the testimony shows an injury inflicted by respondent upon the rights of appellant, which, if permitted to continue, might ripen into a right, and hence the interposition of equity was properly invoked, and that appellant's rights are not to be measured by the value of his property. This argument assumes an existing right in appellant, while a vital question under the pleadings related to the existence of such right. It must be conceded under the evidence that defendant's reservoir did not back the water above his own line or off his own land. If plaintiff had any easement or right of way over defendant's land for his flume it must have been by virtue of a prior appropriation, or by a continuous adverse user for a period commensurate with that fixed by the statute of limitations, viz., for five years. A right acquired by appropriation may be lost by voluntary abandonment. Evidence of nonuser during the period necessary to perfect a prescriptive right tends to show its nonexistence. There was evidence tending to show plaintiff's flume as an appurtenant to his mill and mining claim. Under these circumstances, it was proper to

show that operations at the mill had been discontinued, and that its condition was, and for many years had been, such that it could not be used, not for the purpose of impeaching plaintiff's right to the mine, but to show an abandonment of the right of way, if any, over defendant's land, or such nonuser as would preclude the inference that a prescriptive title ever ripened into existence. A right acquired by prescription to an easement is measured by the extent of the continuous enjoyment, and must be adverse, that is to say, "It must have been asserted under claim of title, with the knowledge and acquiescence of the person having the prior (superior) right, and must have been uninterrupted": *Alta Land & Water Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; *American Co. v. Bradford*, 27 Cal. 361. "In order to constitute a right by prescription, there must have been such an invasion of the rights of the party against whom it is claimed that he would have had ground of action against the intruder": *Water Co. v. Hancock*, *supra*; *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, 30 Pac. 623. It follows that if the flume ceased to be used, and if the property in connection with which it was used was in such condition that no user of the flume could be had, it was competent to prove such fact to show that a prescriptive right did not, and could not, vest in appellant to have and continue his flume upon the land of respondent.

The cause was brought to trial March 3, 1891, and submitted to the court for decision March 4, 1891. On the fourteenth day of March, 1891, the court filed its written decision directing findings in favor of defendant to be prepared and presented, which findings were filed April 6, 1891. After the decision was announced, and before the findings were filed, but at what precise date does not appear, counsel for plaintiff appeared in open court, and asked leave to amend his complaint so as to conform to the evidence, by averring, in substance, that for many years mining had been carried on upon Little Butte creek; and that in times of high water large quantities of tailings and mining debris have been washed down to and upon plaintiff's claims; and that, by the construction and maintenance of defendant's dam, such tailings were prevented from flowing down the creek as they would otherwise have done, and were caused to lodge upon and cover

plaintiff's claim and flume, whereby he was injured and disturbed in the enjoyment of his property. The court refused to permit the plaintiff to so amend his complaint, to which ruling his counsel in due time excepted, and the ruling is now assigned as error. In the course of the trial, the witnesses, in describing the condition of the stream and the property of the plaintiff, incidentally, as it appears to us, described the conditions of the stream as to mining debris and certain dams above plaintiff's flume which had been carried out by floods and never replaced, by reason whereof the wheel of plaintiff and the flume had been to a greater or less degree submerged and clogged by the debris. The granting or refusing leave to amend under such circumstances and at such a time was a matter in the discretion of the court, with the exercise of which this court will not interfere except in case of abuse. No abuse of discretion is apparent in the present instance. It may well be that the court below saw that, if the amendment was allowed, justice would have demanded that the case be reopened, and a further trial of the new issues created thereby had. Be this as it may, no abuse of discretion is made to appear, and hence no error can be predicated on the refusal. The cases cited by appellant are either without application, or refer to instances in which the leave to amend was sought pending the trial. The case of *Bradley v. Parker* (decided by this court September 28, 1893), ante, p. 250, 34 Pac. 234, is on all-fours with the case at bar, and what is said there need not be repeated.

Appellant contends that the findings are contradictory, indefinite and inconsistent, and that there is no finding as to appellant's alleged title or right of possession to the flume described in the complaint. We think the findings, taken as a whole, are consistent, clear and comprehensive. They may be in part epitomized as follows: (1) Plaintiff owns the mine. (2) He built the flume in 1870-71. (3) It is five hundred and sixty-four feet long, and all of it except the upper one hundred and sixty feet is on defendant's land. (4) The flume had not been used for ten years. (5) Plaintiff is not the owner of that portion of the flume on defendant's land—that is to say, the lower four hundred and four feet thereof—and has no easement over said land for the purpose of maintaining said flume, and no right to use said land for the pur-

poses of said flume. (6) That the dam does not cause water to flow back on any of plaintiff's property. (7) The dam does not cause water to flow back on plaintiff's flume. (8) The dam does submerge a part of the flume or rock cut, but the part so submerged is the property of defendant, "and plaintiff has no right or interest in or to any part of it." (9) Defendant is the owner, in possession of, and entitled to the possession of all the lands in any wise affected by the waters accumulated, flooded or submerged by said dam. (10) Plaintiff has not sustained any injury or damage. (11) Defendant's title to the land flooded was initiated in 1868, and he constructed the dam in 1888, for a useful purpose, viz., to divert water for mining and irrigating, and is using it for such purposes. There are other findings which are in accord with the foregoing. That the evidence supports these findings we cannot doubt, and that they support the judgment is equally clear. To analyze the evidence and discuss it at length would only lead to the conclusion that plaintiff, without authority or right in him so to do, constructed the lower end of his flume upon the land of plaintiff, and that the evidence was sufficient to authorize the court below to find (1) that the user was not of sufficient duration and sufficiently continuous for five years to give to the plaintiff a prescriptive right to have and maintain the same on defendant's land; or (2) if such prescriptive right was established by user, that the same was lost by abandonment. It follows that the judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

WHEELAN v. BRICKELL et al.

No. 15,557; September 29, 1894.

38 Pac. 85.

Husband and Wife—Public Lands—Trusts.—In 1860 a Married Man went into possession of government land known as the "Outside Lands" of San Francisco. In 1863 he died, and his wife, with their children, continued in possession, and was in possession at the passage of act of Congress of March 8, 1866 (14 Stat. 4), relinquishing the title of the United States in said lands to the city of San Francisco, in trust to be "disposed of and conveyed by said city, to parties in the bona fide actual possession thereof by themselves or tenants on the passage of this act," on such terms as the legislature should prescribe. While the husband and wife were in possession, they executed a declaration of homestead under the California homestead act of 1862, by which the homestead estate, on the death of either, vested absolutely in the survivor. Thereafter, the city deeded the land to the widow, she having complied with the various ordinances and legislative acts relative thereto. Held, that as she had bona fide, actual possession at the passage of the act, no trust arose, under the conveyance to her, in favor of said children.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Fairfax H. Wheelan, administrator of the estate of John H. Baker, deceased, against John Brickell and another, to quiet title to the said estate. Judgment by default for defendants and plaintiff appeals. Affirmed.

King & Shaw for appellant; A. N. Drown for respondents.

PER CURIAM.—This is an action by Fairfax H. Wheelan, administrator of the estate of John H. Baker, deceased, to quiet the title of the estate of the said John H. Baker, deceased, in and to certain lands, known as "Outside Lands," situate and being within the present limits of the city and county of San Francisco; to have said lands restored to the possession of said estate for administration and distribution; to recover damages from defendants as and for the value of the use and occupation, rents, issues and profits thereof, etc.

Defendants interposed a demurrer to the complaint upon several statutory grounds, among which was that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court below, and, plaintiff having declined to amend his complaint within the time and pursuant to the leave for that purpose granted, his default was duly entered, and final judgment for costs was entered in favor of defendants, from which judgment plaintiff appeals. The questions arising on the appeal in this case are substantially the same as those considered by this court in the action No. 15,074, between the same parties, decided June 10, 1893 [Wheelan v. Brickell, ante, p. 47, 33 Pac. 396], and in Baker v. Brickell, 87 Cal. 329, 25 Pac. 489, 1067. What was said in Wheelan v. Brickell, No. 15,074, will apply with equal force here; and upon the authority of that case, and of Baker v. Brickell, 87 Cal. 329, 25 Pac. 489, 1067, the judgment appealed from is affirmed.

HARPER v. ANDERSON et al.

No. 18,262; September 29, 1894.

37 Pac. 926.

Partnership—Accounting—Exclusion of Books as Evidence.—

Where, in an action for a partnership accounting, books offered in evidence were objected to as not showing the transactions between the parties, the action of the trial court in rejecting the books will not be disturbed on appeal unless on the trial the party offering the books pointed out wherein they were relevant, and the record shows what he proposed to prove thereby.

Partnership—Accounting—Parties.—One Who Buys Out a Retiring Partner, and forms a partnership with the other member of the firm, is not a proper party to a suit by such member against the retiring partner for an accounting, the complaint alleging merely that he has funds of the new partnership in his hands, which were collected by the procurement of the retiring partner.

APPEAL from Superior Court, San Joaquin County; Ansel Smith, Judge.

Action by J. H. Harper against C. M. Anderson and another for a partnership accounting. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

L. W. Elliott and A. H. Carpenter for appellant; Nicoll & Orr for respondents.

HAYNES, C.—Plaintiff and defendant Anderson were co-partners in the nursery business from May, 1888, to May, 1889, when defendant Anderson sold out to defendant Wheeler. The complaint charges that each of the defendants has collected and received moneys belonging to the firm of Harper & Anderson, of which one-half belongs to plaintiff, and prays for an accounting. Among other allegations, it is charged that defendant Wheeler has taken possession of the books, and for that reason plaintiff is unable to ascertain the amount collected or the amount due. The cause was tried by the court without a jury. At the close of plaintiff's evidence in chief a nonsuit was granted as to defendant Wheeler, and, upon the final submission of the case, findings were filed in favor of defendant Anderson, upon which judgment was entered. Plaintiff moved for a new trial on a statement and now appeals from the judgment and an order denying a new trial.

The appeal from the judgment cannot be considered, because not taken in time.

The answer admitted the partnership between the plaintiff and Anderson, and its dissolution, but denied that the defendants had the books of the firm, or that any collections had been made of moneys belonging to the firm. There was no allegation that the business of the firm had been settled or adjusted, nor that there were no outstanding accounts at the time of the dissolution. The court, however, found that after the dissolution there was a settlement, and that Anderson paid plaintiff a certain sum of money, but that at the time of said settlement it was agreed that any sums of money which might thereafter be collected should belong to the plaintiff and Anderson, one-half to each. The evidence amply sustains the finding of these facts.

Certain books were produced upon the trial, but by whom does not appear. The plaintiff, when on the stand as a witness in his own behalf, was shown certain books, and testified

as follows: "I recognize that book as my own book. I bought and paid for it. It was stolen out of my house. It is one belonging to Harper & Anderson, not Harper & Wheeler. This one we had at the nursery, and the other was down at Stockton. We were selling here. This book will show the amount of trees sold at the nursery. Both of these will show the number shipped down, and this book will show the number sold here. This, the number actually received. . . . I don't know how many trees were sold down here. The books will show." Plaintiff thereupon offered the books in evidence. The defendants objected on the ground that they showed the business between Harper and Wheeler, and were not the books referred to in the complaint. The objection was sustained, and plaintiff excepted. After additional statements by plaintiff in relation to the books, to the effect that one shows the sales at Stockton, and another the sales at Acampo, they were again offered in evidence, and again rejected; the last objection being placed upon the ground that "they show on their face that they do not show the transactions of Harper and Anderson." It must be presumed that the court made such inspection of the books as to satisfy it that the objection that they showed upon their face that they did not show the transactions of Harper and Anderson were true. If, notwithstanding their apparent irrelevancy, they in fact contained relevant and material evidence for the plaintiff, it was the duty of counsel to point it out, and offer to show the same by the books, and to insert in the record the fact so offered to be proven.

It is also urged that the court erred in granting the nonsuit as to Wheeler; that if he bought out Anderson he was bound to account to Harper for one-half of the collections; and that he testified that he had collected \$2,200, no part of which had been paid to plaintiff. Wheeler testified that he took a bill of sale from Anderson, and we infer from one of the specifications of error that it was put in evidence, but it is not set out in the record, nor its substance stated, nor does it appear in any manner that he bought Anderson's interest in the accounts. There is also evidence tending to show that Wheeler purchased from Anderson at plaintiff's instance, and became plaintiff's partner in the business, and that the money so received was the money of

the new firm, in which Anderson had no interest, and for which he was not liable. The complaint did not allege any indebtedness from Wheeler on account of the business of the new firm, nor even allege that he was in any way connected with the plaintiff in business; and the only liability alleged against him was for money belonging to Harper and Anderson, which it was charged he had collected by the procurement of Anderson. The nonsuit was therefore properly granted.

It is also urged that the court erred in admitting in evidence the bill of sale from Anderson to Harper. It is sufficient to say that the record does not set out the bill of sale, nor show that it was offered or received in evidence. The appeal from the judgment should be dismissed and the order denying a new trial affirmed.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the appeal from the judgment is dismissed and the order denying a new trial is affirmed.

BENNETT et al. v. MORRIS et al.

No. 18,323; September 29, 1894.

37 Pac. 929.

Pleading—Demurrer.—The Question Whether a Pleading is Ambiguous and uncertain cannot be raised by a general demurrer.

Evidence—Absence of Revenue Stamp.—The fact that the record of a deed executed in 1872 does not show that any United States revenue stamps were placed thereon does not render such record incompetent evidence.

Waters.—In an Action for Damages for the Diversion of water, where a witness has testified only as to the condition of ditches and flumes, and the work required to clear them, and not as to the amount of the damage, the action of the trial court in striking out an answer of the witness, "Yes, sir, I have," given in response to a question by defendant's counsel as to whether the witness has stated all the damages, is within its discretion.

Waters.—In an Action for the Diversion of Water from a Mine, a witness who testifies that he knows the claims and ditches involved;

that he has been over the ditches and at the mines of both plaintiff and defendant; that he has resided in the vicinity twelve or thirteen years, and is a miner by occupation, having been engaged mostly in hydraulic mining—is qualified to give his opinion as to whether it is practicable for plaintiff to run his mine if defendant continues to run his in the same way as before.

APPEAL from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by W. P. Bennett and others against George Morris and others to restrain the diversion of water, and for damages caused by such diversion. Judgment was rendered for plaintiffs, and defendants appeal. Affirmed.

Jas. F. Farraher and R. S. Taylor for appellants; Gillis & Tapscott for respondents.

BELCHER, C.—This is an action to restrain the diversion of water, and for damages. By the judgment the plaintiffs were awarded an injunction and damages in the sum of \$250. The defendants appeal from the judgment and an order denying their motion for a new trial. In support of the appeal it is claimed that several errors of law were committed which call for a reversal. These alleged errors will be noticed in their order.

1. The demurrer to the first cause of action set up in the complaint was general, and it was not error to overrule it. The words objected to, as showing that no cause of action was stated, must be read in connection with the balance of the count; and, when so read, the most that can be said is that they make the pleading ambiguous and uncertain. But that is an objection that cannot be raised by a general demurrer.

2. The plaintiffs offered and were permitted to read in evidence the record of the deed from Timothy Haley to Andrew Bahr, dated October 18, 1872, and also the conveyance indorsed thereon from Bahr to George McNeal, dated February 14, 1873. The Haley deed appears to have been signed by the grantor's mark, and witnessed as required by section 14 of the Civil Code, and it was proved that diligent search had been made for the original papers, and that they could not be found; that the copies found in the record were substantially

correct; and that under the said deeds the grantee, McNeal, entered into possession of the property, and held such possession until he transferred it to other parties in June, 1878. For the purposes for which the plaintiffs sought to use these deeds, it was therefore immaterial whether they were properly recorded or not. And it was also immaterial that it did not appear that any United States revenue stamp was placed thereon: *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Thomasson v. Wood*, 42 Cal. 416.

3. The point is made in appellants' brief that the court erred in admitting in evidence the deed from George McNeal to E. L. Shumway and brother, but no argument is made in support of this position. The point is clearly untenable. McNeal testified to buying the property from Bahr, and that he remained in possession of it and used the ditch and water every mining season up to 1878, when he deeded the property to the Shumways; and Edwin L. Shumway testified that he and his brother got the property from McNeal, and remained in possession of it jointly for twelve years, when they conveyed it to the plaintiffs. The deed was therefore clearly admissible, in connection with the other proofs offered, to show that the plaintiffs and their predecessors in interest had been in possession of the property in question, and claimed to own it, for more than twenty years before the action was commenced.

4. The plaintiffs' witness Knackstedt was asked on cross-examination by counsel for defendants if he had stated all the damages that had been done to plaintiffs' claim, and answered, "Yes, sir, I have." The answer was stricken out on motion, and in this we see no prejudicial error. The witness did not attempt, in his direct or cross-examination, to estimate the amount of damage done. He testified as to the condition of the ditches and flumes at different times, and the work required to clean them out; and, as to all the facts stated by him, counsel were in no way restricted in their cross-examination. The court evidently considered the question and answer objected to as improper, under the circumstances, and its action was clearly within the limits of its discretion.

5. During the direct examination of plaintiffs' witness McLaughlin, he was asked whether it was practicable for the plaintiffs to run their mine if the defendants continued to run theirs in the manner they had been running it during the

last mining season. The question was objected to on the ground that the witness had not shown himself competent or qualified to answer it. The objection was properly overruled. The witness had testified that he knew the parties to the action, and the claims and ditches involved; that he was over the ditches in 1892, and had been at the mines of both plaintiffs and defendants; that he had resided in the vicinity for twelve or thirteen years, and was a miner by occupation, having been engaged mostly in hydraulic mining. This was a sufficient showing that the witness was qualified to give the opinion asked for.

6. The plaintiffs' witness Edward L. Shumway was asked on his direct examination what it would cost to clean out their lower ditch; that is, clean out the debris that is there now. The question was objected to upon the ground that plaintiffs had not shown that this debris was run into the ditch by any act of defendants, or that they were responsible therefor. The objection was overruled, and, as we think, properly. It was clearly shown that the debris which filled up the "lower ditch" came down from defendants' mine, and there was no pretense that it came from any other source.

7. The only other questions discussed by counsel relate to the sufficiency of the evidence to justify the findings, and the form of the judgment. It would subserve no useful purpose to state the evidence. It covers about sixty pages of the transcript, and is in some respects conflicting. A careful reading of it, however, shows that it is amply sufficient to justify each of the findings complained of.

The judgment does not require any modification. It properly restrains the defendants from using any of the waters of the stream, except at such times and in such manner as they can do so without materially deteriorating the quality of the water for mining purposes on plaintiffs' claim, or diminishing the quantity of water flowing into plaintiffs' ditches to less than one thousand inches, measured under a four-inch pressure; and, so long as defendants comply with those conditions, plaintiffs will have nothing to complain of. The judgment and order appealed from should be affirmed.

We concur: Temple, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

MERLEY et al. v. BOULON et al.

No. 15,630; September 29, 1894.

37 Pac. 931.

Appeal.—A Notice of Appeal Stating That the Appeal is from an “order” denying a motion for a new trial, and from an “order” denying a motion to set aside the judgment, a description of which is given, and “from the whole thereof,” is insufficient as to notice of appeal from the “judgment.”

APPEAL from Superior Court, San Francisco County;
J. C. Hebbard, Judge.

Action by one Merley and others against one Boulon and others. There was a judgment for defendants and plaintiffs appeal. Dismissed.

Smith & Murasky for appellants; Pillsbury, Blanding & Hayne for respondents.

DE HAVEN, J.—The notice of appeal herein is addressed to the attorneys for respondents, and is in the following words: “You will please take notice that the plaintiff substituted in the above-entitled action hereby appeals to the supreme court of the state of California from the order denying plaintiff’s motion for a new trial, and from an order of said court denying plaintiff’s motion to set aside the decision and judgment in the action, which said judgment was therein entered in the said superior court on the sixteenth day of December, 1891, in favor of the defendants in said action and against plaintiffs, and from the whole thereof.” The appeal from the orders named in this notice was dismissed by this court, February 6, 1893; and the appellant now claims that the notice above set out is sufficient as a notice of appeal from the judgment therein described, and he insists upon his right to be heard upon such appeal. This contention cannot be sustained. The notice of appeal is certainly very awkwardly constructed, but is not ambiguous, and it cannot possibly be construed as an appeal from the judgment therein mentioned. It says nothing about an appeal from the judgment, but gives notice

only that the plaintiff "appeals to the supreme court from the order denying plaintiff's motion for a new trial, and from an order of said court denying plaintiff's motion to set aside the decision and judgment in the action"; and then follows a description of the judgment to which the said motion of plaintiff related; and the notice then concludes with the words "and from the whole thereof." These latter words refer to the orders previously mentioned, and indicate that the appeal is from the whole and not a part of said orders.

While notices of appeal should be liberally construed, and no appeal should be dismissed because of any misdescription of the judgment or order to which it relates, unless it appears that the respondent has been misled by such misdescription, still this rule is not liberal enough to justify us in holding that the above notice of appeal is or was intended as an appeal from a judgment. In order to constitute such a notice, the paper relied on for that purpose should at least state that the appeal is taken from a judgment; and this, considering the fact that it is not difficult to find words to properly express such an intention, is not a harsh rule. It follows from these views that the cause is not properly on our calendar, the only appeal in the case having already been disposed of; and for this reason the submission thereof is set aside, and the cause stricken from the calendar. So ordered.

We concur: McFarland, J.; Fitzgerald, J.

SCHAEFFER v. HOFMANN.

No. 15,382; September 29, 1894.

37 Pac. 932.

Quieting Title.—In an Action to Quiet Title to Lands, where no mortgage lien is claimed, and where the answer pleads possession under a contract of sale, and offers payment of the amount due, a judgment declaring the amount due to be a mortgage on the land will be reversed as not warranted by the pleadings.

Quieting Title.—Plaintiff, by a Verbal Contract with Defendant, agreed to convey certain lands to him within five years on the pay-

ment of a certain sum. Defendant went into possession, and made improvements. Held, in an action to quiet title, that equity would require plaintiff to convey on payment of the amount due within a specified time, in default of which his title would be quieted.¹

Costs on Appeal from Two Improper Judgments which, if enforced, would have cast heavy expense on the appellant, are properly chargeable to respondent.

APPEAL from Superior Court, Napa County; E. D. Ham, Judge.

Action by Caspar Schaeffer against Conrad Hofmann to quiet title to land. There was a personal judgment for plaintiff for a specific sum, and a final judgment making such sum a mortgage lien on the land. Said Hofmann having died, Ida Hofmann, his administratrix, was substituted as defendant, and she appeals. Reversed.

F. E. Johnson for appellant; H. M. Barstow for respondent.

SEARLS, C.—This action is brought to quiet the title of plaintiff and to procure him to be restored to possession of a tract of land containing about ten acres, situate in Pope valley, county of Napa. Defendant answered, denying the allegations of plaintiff as to his right to possession of the premises; admitted that he (the said defendant) was in possession; and by way of cross-complaint set out that on the fifth day of September, 1884, plaintiff and defendant entered into a verbal agreement by which plaintiff agreed to sell to him the land upon the payment by defendant to him of \$150, with interest at eight per cent, within five years, to convey the same to defendant, etc.; defendant was to take possession of the land at once, and retain the same until payment and conveyance; that defendant entered into possession, cleared the land, fenced it, erected a house and planted a vineyard and orchard thereon, etc.; that defendant has always been ready and willing, and is now anxious, to pay the purchase money, and offers to pay the same into court, and asks that plaintiff be decreed to execute a deed, etc. Plaintiff answered the cross-

¹ Cited and followed in *Bates v. Loffler* (S. D.), 133 N. W. 287, a case where the purchaser had made all the payments contracted for except the last one, and the vendor had not in his complaint alleged damage by reason of the breach.

complaint, claiming, in substance, that the consideration to be paid by the defendant for the land was \$650, with interest, \$100 of which he admitted had been paid. The cause was tried by the court, and written findings waived. An interlocutory decree was entered, decreeing the defendant to be entitled to a deed of the land from plaintiff upon payment of the sum of money due as purchase money and interest, and referring the question of the amount due to the court commissioner to take testimony and report. The court commissioner reported the sum of \$594.28 due plaintiff from defendant. Thereupon, on the thirtieth day of January, 1893, an ordinary common-law judgment was entered in favor of plaintiff, and against defendant, for said sum of \$594.28. Thereafter, on the thirteenth day of February, 1893, a decree was duly filed, but which decree purports to have been signed January 30, 1893. By this decree, omitting the formal parts, it was decreed that the sum of \$594.28 due plaintiff was secured by a lien upon the land, and constituted a valid mortgage thereon, and which mortgage was ordered foreclosed, and the property sold, etc., as in ordinary cases of foreclosure sale. Defendant departed this life, and the administratrix of his estate, having been substituted as a party defendant, appeals from both judgments.

The cause comes up on the judgment-roll. It is conceded by both parties that the personal judgment was improperly entered, and hence should be reversed, annulled and set aside. As to the final decree the position of appellant is (1) that the first judgment was final, and, although not warranted by the pleadings, was valid upon its face, and no other or further judgment could be entered while it remained in force; (2) that the final decree entered February 13, 1893, holding the demand of plaintiff to be a valid and subsisting mortgage, and foreclosing the same, was not warranted by the pleadings.

It may be remarked that plaintiff, in his complaint, asked that his title be quieted. The defendant averred a contract for the purchase of the property by him, and averred a willingness to pay. Plaintiff admitted this, and practically the only difference between them was as to the amount due as purchase money. Under these circumstances, we agree with what is said by appellant in the opening brief, viz.: "The court should have directed the respondent to execute the necessary

conveyance upon receiving the purchase money within a limited time, and, if appellant's intestate should fail to make payment within that time, then the respondent's title be quieted, and we have possession. There would have been some equity in this kind of a judgment." We may add that there would have been complete equity in such a decree. Counsel for respondent replies: "I agree with appellant that the proper judgment to have been entered is one directing the payment by the appellant within a given period, say thirty days, of the amount found due from him, and, in default of such payment, that respondent's title be quieted."

Counsel for respondent claims that the judgment as rendered was more favorable to appellant than that to which her intestate was entitled, and hence that the costs of the appeal should be assessed against her. There were two improper judgments rendered against appellant's intestate. Upon the first of them an execution might have been levied upon, and enforced against, the property of the judgment debtor. Upon the other, the expenses of a sale would have been cast upon the property of the estate represented by the appellant; or, if she paid the demand, she would have been left without the muniment of title to which, on such payment, she was entitled. It was her right to avoid these disadvantages, and it could only be done by an appeal, the costs of which should not be visited upon appellant. Appellant in her reply brief urges that a new trial should be granted because of the improper allowance of some item of interest. It cannot be said from the judgment-roll that there is any just ground for this contention.

The personal judgment of January 30, 1893, appealed from, should be reversed, set aside and annulled. The final decree of foreclosure, filed February 13, 1893, appealed from, should be reversed, and the court below directed to enter a decree requiring the respondent to execute a proper deed of conveyance to appellant as administratrix of the estate of Conrad Hofmann, deceased, of the property in dispute, upon the payment to him by appellant of the sum of \$594.28, with interest thereon from July 29, 1891, at seven per cent per annum, within sixty days from the entry of such decree, and, if the appellant shall fail for sixty days to make such payment, that then and in that event the title of respondent to said land

and premises be quieted, and that he be restored to the possession thereof.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the personal judgment of January 30, 1893, appealed from, is reversed, set aside and annulled. The final decree of foreclosure filed February 13, 1893, appealed from, is reversed, and the court below directed to enter a decree requiring the respondent to execute a proper deed of conveyance to appellant as administratrix of the estate of Conrad Hofmann, deceased, of the property in dispute, upon the payment to him by appellant of the sum of \$594.28, with interest thereon from July 29, 1891, at seven per cent per annum, within sixty days from the entry of such decree, and, if the appellant shall fail for sixty days to make such payment, that then and in that event the title of respondent to said land and premises be quieted, and that he be restored to the possession thereof.

MALVILLE v. KAPPELER.

No. 15,570; October 2, 1894.

37 Pac. 934.

Executor—Liability for Services of Attorney.—In an Action to Recover attorneys' fees for services rendered in an action in which defendant was named as defendant both individually and as executrix, though not a necessary party thereto, it appeared that she made no claim in such prior action in her individual capacity, and she testified that she employed plaintiff merely as attorney for the estate, but this plaintiff denied. The property received by defendant in settlement of the prior action was applied to the benefit of the estate of which she was executrix, and plaintiff received an allowance from the estate for his services, under order of court. Held, that a finding that plaintiff was not employed by defendant in her individual capacity was proper.

Executor—Liability for Services of Attorney.—In Such an Action the Inventory filed by the executrix, who was the wife of the

testator, would not determine whether certain premises were separate or community property, and was therefore inadmissible for that purpose.

APPEAL from Superior Court, City and County of San Francisco; Charles W. Slack, Judge.

Action by one Malville against one Kappeler. There was a judgment for defendant, and plaintiff appeals. Affirmed.

N. B. Malville for appellant; L. J. Hardy, Jr., for respondent.

HARRISON, J.—The appellant is not entitled to recover from the respondent for his services, unless they were rendered at her request. This issue is directly presented by the pleadings, and the testimony thereon was contradictory; the plaintiff testifying that he was retained by her as her attorney in the action in which the services were rendered, and the defendant testifying that she never employed him, except as the attorney for the estate of her husband, of which she was executrix, and that for these services he had been fully paid. The finding of the court is in accordance with the testimony of the defendant, and upon this appeal must be accepted as conclusive. It may be added that the testimony of the defendant is corroborated by the circumstances under which the services were rendered. The suit was to foreclose a mortgage upon property belonging to the estate of the deceased husband of the defendant, made by him in his lifetime, and the only interest of the defendant in the property was such as she had under the will. Although she was named as a defendant individually, as well as in her representative capacity, she was not a necessary party defendant in the foreclosure suit, and in the answer which was prepared by the plaintiff no claim was made on her behalf, except as the executrix of the will. All the property that was received in the settlement of the suit was received for and applied to the benefit of the estate of which the defendant was executrix. For the services thus rendered by the plaintiff he was allowed by the probate court the sum of \$1,500, and the court below finds that this was for all the services rendered by him in the action.

The inventory in the estate would not, for the purposes of this action, determine whether the mortgaged premises were separate or community property, and when offered for that purpose, was properly refused by the court. The judgment and order are affirmed.

We concur: Van Fleet, J.; Garoutte, J.

BANK OF OROVILLE v. LAWRENCE et al. (LAWRENCE, Intervener).

No. 18,257; October 1, 1894.

37 Pac. 936.

Trial—Special Findings.—If a Discrepancy Exists between the general finding and the more specific findings of particular facts, the latter must control.

Pleading—Ambiguity.—Where an Instrument Which is in Legal effect a mortgage and not a deed of trust is set out in full in the complaint, the fact that it is there designated a "trust deed so being and operating as a mortgage" does not create an ambiguity in the pleading.

A Mortgage Given to Secure Advances Up to a Certain Sum, if duly recorded, takes precedence of a subsequent attachment, to the extent of any balance due on such advances up to said sum.

APPEAL from Superior Court, Placer County; M. K. Harris, Judge.

Action by the Bank of Oroville against George H. Lawrence and Nellie L. Lawrence. W. J. Lawrence intervened. Plaintiff had judgment and defendants and intervener appeal. Reversed.

John Gale for appellants; Harris & Lloyd for respondent; Reardan & White for intervener.

VAN FLEET, J.—This action was brought to foreclose an instrument in the nature of a mortgage given by defend-

ants on certain real and personal property to secure the repayment of advances, which, by its terms, plaintiff was to make to the defendant George H. Lawrence, by paying his overdrafts to the amount of \$1,800. The complaint alleges the making of advances in the aggregate of \$4,449.76, the repayment of \$3,278.86, and a balance due plaintiff of \$1,218.90, with interest in the sum of \$47.65. A demurrer by defendants was overruled, and they answered, admitting the making of the mortgage, but denying that there was any indebtedness due. There was an intervention by one W. J. Lawrence, claiming a prior lien on the mortgaged property by virtue of an attachment levied in a suit against the defendant George H. Lawrence. The court found in favor of plaintiff in the amount claimed, and in favor of the right of the intervener to a prior lien upon the personal property, but postponing his lien upon the realty to that of the plaintiff, and a decree was entered accordingly. The defendants appeal from the judgment, and the intervener from so much thereof as postpones his lien upon the real property. The appeals are based upon the findings alone.

From a mass of probative facts found, it appears in substance that the defendant George H. Lawrence, who was a butcher in the town of Oroville, desiring to buy a band of beef cattle which were for sale, and being without ready money to make the purchase, applied to the plaintiff bank. The price of the cattle was \$1,600, and the bank agreed, in consideration of the making of the mortgage in suit, to furnish the money to pay for the cattle, and to advance Lawrence \$200 besides, making in all the sum of \$1,800; the arrangement being that the bank should take the bill of sale of the cattle in its own name, and hold it as additional security for its advances. The mortgage was accordingly executed, and on the same day that it was delivered, February 17, 1893, Lawrence drew his check on the bank for \$1,800, which was honored by the bank, giving to the agent having charge of the cattle its draft for \$1,600, and taking the bill of sale, and paying to Lawrence \$200 in cash. For some reason, however, which does not clearly appear, the agent was unable to make delivery of the cattle, the sale fell through, and the \$1,600 draft was returned to the bank on February 20th, without having been negotiated or cashed. On February 23d, Law-

rence paid into the bank \$100, and subsequently, to adopt the language of the finding, "on the 25th of said month of February the plaintiff, recognizing that defendant George H. Lawrence had received no benefit through the attempted purchase of said band of cattle, honored his overdrafts under the terms of said trust deed or mortgage to the extent of four hundred and sixty-five and eleven hundredths dollars (\$465.11) and in like manner, on the twenty-seventh day of said month, advanced the further sum of three hundred and ninety-five dollars (\$395), and in like manner, on the 1st day of the following month of March, the further sum of \$32.15. That on the third day of said month of March the defendant deposited with plaintiff the further sum of one hundred and forty dollars (\$140), thus leaving him indebted to the bank, upon a simple money basis, in the sum of eight hundred and fifty-two and twenty-six hundredths (\$852.26), saying nothing of interest." On the 4th of March the parties were informed that the beef cattle for which they had negotiated could be purchased, and upon the promise of Lawrence that he would repay plaintiff the \$852.26 already advanced, by the 6th of March, plaintiff advanced and paid the \$1,600 for the cattle; taking the bill of sale in its own name, and the cattle into its possession, as originally agreed. Lawrence did not, however, pay the \$852.26 as promised, and plaintiff then required him to pay in cash for the cattle at the rate of \$30 per head, as he received them from plaintiff's possession, and on these terms the cattle were eventually delivered to and slaughtered by Lawrence. It is further found that on May 27th the plaintiff advanced and paid for Lawrence the sum of \$95.80 to discharge certain attachment claims against the mortgaged property. The above facts, with others of an immaterial character, are all found in finding 5. It is then found, in finding 6, "that, in view of all the deposits and payments made by said George H. Lawrence, the balance of the account on the twenty-ninth day of May, 1893 (the date of the commencement of this action), stood in favor of plaintiff and against said defendant in the sum of one thousand two hundred and eighteen and ninety hundredths dollars (\$1,218.90) principal, besides the sum of (\$46.05) forty-six and five hundredths dollars interest, at the rate of one per cent per month as provided in said trust deed, and that the

same was long overdue and payable from said defendant George H. Lawrence to plaintiff, by virtue of the terms of said overdrafts or checks, and as well also by virtue of said demand for payment of date of March 7, 1893."

The main question presented is whether the findings support the judgment, and we think it manifest that they do not. Under the issues raised the ultimate facts to be found were as to the amount of the indebtedness, if any, and whether the same was due. It is true that the court, in finding 6, finds the balance of the account to be \$1,218.90 in plaintiff's favor, with certain interest, and that by the terms of the overdrafts the same was due; but it is perfectly evident that this finding is merely a conclusion drawn from the antecedent specific facts found in finding 5, and it will be as readily seen that these facts do not sustain the conclusion, either as to the amount of the balance standing in plaintiff's favor, or as to the fact of its being due. These findings being inconsistent, we must look to the specific facts rather than the general conclusion to find support for the judgment, upon the well-settled principle that if a discrepancy exists between a general finding and the more specific findings of particular facts the latter must control. Looking at finding 5, it is apparent that the lower court was under a misapprehension of the effect of the transaction in including, as one of the advances made by plaintiff, the \$1,600 draft or bill of exchange given February 17th. The sale of the cattle having fallen through at that time, and the draft having been returned to the bank and never paid, it did not constitute an advance under the mortgage, since the sum was never in fact withdrawn from the funds of the bank. This, then, left but the \$200 paid to Lawrence as the amount actually advanced on February 17th. Subsequently other advances were made, which gave a balance on March 3d of \$852.26 owing plaintiff, these advances being clearly within the terms of the mortgage, because less in amount than \$1,800. On March 4th the plaintiff advanced and paid the \$1,600 for the cattle. This advance, in excess of the security afforded by the mortgage, was made partly in consideration of the promise by Lawrence to pay back within two days the balance of \$852.26 then standing against him. This, however, he did not do, and thereupon the plaintiff required Lawrence to pay for the cattle as he got them. Right

here the finding is indefinite and obscure on the point as to whether Lawrence received any of the cattle without paying for them. It is possible he may have done so before the plaintiff made the requirement that he pay cash. If he did pay for them all at the rate of \$30 per head, he must have paid back all and a little more than their purchase price, since there were fifty-five head in the lot. If the fact is that there remained any unpaid portion of the sum advanced for the cattle, it should be distinctly found, in order to strike a correct balance. As the findings leave the account, the most that can be found against the defendant is the item of \$852.26, due March 3d, and the \$95.80 advanced May 27th to discharge attachments, making \$948.06. There is no way that we can discover, under the facts found, by which the balance arrived at by the court can be figured out. Nor is there any sufficient finding as to the balance due when the action was commenced. Here, again, the specific facts found do not support the conclusion stated in finding 6. As to the \$852.26, the promise of Lawrence to repay that amount on March 6th was for a good consideration, and that sum became due at that date. But there is nothing whatever in the findings to show any understanding or agreement, as required in the mortgage, as to when the \$1,600, or any part of it, or the item of \$95.80 subsequently advanced, should be repaid; and as the \$852.26 cannot be traced into the final balance struck, the judgment cannot be supported, because there is nothing to show that that balance was due when the action was commenced. There being no basis, in view of the uncertainty of the findings, for a modification of the judgment, the case will have to be sent back for a new trial.

There is no other point requiring extended notice. The demurrer of defendants to plaintiff's complaint was properly overruled. The instrument sued on, while having the form of a deed, and purporting in terms to convey the title to the property, shows upon its face that it was intended as, and in legal effect is, a mortgage, and not a deed of trust: *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 65. Being set out in full in the complaint, the fact that the pleader designates it as a "trust deed so being and operating as a mortgage" does not create an ambiguity or uncertainty in the pleading, since its character is to be determined from its terms. The allegation

“that all said advances made by way of payment of said overdrafts were by the terms thereof, and so became immediately due and payable,” is not a conclusion of law, but is, while awkwardly expressed, a sufficient allegation of the ultimate fact. The statement published by the plaintiff corporation was substantially sufficient to bring it within the law, and the court did not err in so holding. Nor did the court err, under the facts found, in postponing the lien of the intervener to that of the plaintiff upon the real estate. While the plaintiff never acquired a lien upon the personalty by virtue of his mortgage, he did upon the realty; and, the attachment of the intervener having been levied subsequently to the recordation of the mortgage, the lien of the latter took priority, to the extent of any balance found due plaintiff up to \$1,800, since the fair construction to be put upon the terms of the mortgage is that it was a continuing security for any balance of advances or overdrafts not exceeding \$1,800. Judgment reversed and cause remanded for a new trial.

We concur: Harrison, J.; Garoutte, J.

EGGER v. RHODES.

No. 19,286; October 3, 1894.

37 Pac. 1037.

Expert Witness.—One Who has Been a Civil and Hydraulic engineer for several years is qualified to testify as an expert in matters touching civil and hydraulic engineering.

APPEAL from Superior Court, San Bernardino County; John S. Campbell, Judge.

Action by F. W. Egger against C. H. Rhodes to rescind a contract for the sale of land. Judgment for plaintiff and defendant appeals. Affirmed.

Chas. W. Allen for appellant; H. C. Rolfe for respondent.

PER CURIAM.—This is an action to rescind a contract for the sale of land. Plaintiff had judgment and defendant appeals.

1. The demurrer to the complaint was general, and was properly overruled. The facts stated were fully sufficient to constitute a cause of action.

2. It was shown that the witness F. C. Finkle was and had been a civil and hydraulic engineer for several years. This was a sufficient foundation to qualify the witness to testify as an expert in regard to the matters to which his attention was called. The objection that no opportunity was given defendant to question the witness as to his preparation for doing the work of a civil engineer, or as to any work done by him while claiming to be such, is not sustained by the record. So far as appears, no such questions, or any others, were asked or attempted to be asked by defendant for the purpose of testing the competency or skill of the witness.

3. It is earnestly insisted that the evidence was insufficient to justify the findings and decision of the court, but this point cannot be sustained. The findings cover all the issues, and are quite full and specific. To state the evidence in support of them would require a lengthy opinion, and no good would be accomplished by it. It is sufficient, in our opinion, to say that there was evidence sufficient to justify each of the findings assailed, and that the judgment cannot be reversed on this ground. We think the judgment and order appealed from should be affirmed, and it is so ordered.

ROYAL v. DENNISON et al.*

No. 19,482; October 3, 1894.

38 Pac. 39.

Vendor and Vendee—Deed from Stranger.—One to whom a person has agreed to convey land is entitled to a deed from such person, and need not accept a deed from a stranger to the contract.¹

*For subsequent opinion in bank, see 109 Cal. 558, 42 Pac. 39.

¹ Cited in the note in 37 L. R. A., N. S., 1123, on whether a purchaser of real property may be required to accept a deed of a third person.

Exchange of Lands.—Where, in a Contract for the Exchange of land, the values of the respective parcels have been fixed, a party to the contract, who had no title to the land he contracted to convey, and who has placed himself in such a position that he cannot acquire title, cannot object to the tender of the deed by the other party because made on condition that he pay the amount fixed by the contract as the value of the land to be conveyed by him.

Ejectment—Judgment-roll as Evidence.—In Ejectment, Where defendant claims that plaintiff agreed to convey him the land in exchange for other land, the judgment-roll in a creditors' action against defendant to have a deed by him of his land declared void is admissible to show that defendant is unable to convey his land.

APPEAL from Superior Court, Los Angeles County; William P. Wade, Judge.

Action of ejectment by Aaron W. Royal against G. L. Dennison and others. Judgment was rendered for plaintiff and defendants appeal. Affirmed.

E. C. Bower for appellants; Geo. W. Knox for respondent.

HAYNES, C.—In ejectment to recover possession of a certain house and lot in the city of Los Angeles. The answer, after denying the averments of the complaint, for a separate answer and equitable defense alleged, in substance, that in August, 1887, the defendant G. L. Dennison purchased the demanded premises from the plaintiff, and as the consideration thereof agreed to convey to the plaintiff four certain lots in or near the city of Pasadena, and prior to the commencement of the action had tendered to plaintiff a deed for said lots, and demanded from plaintiff a deed of the demanded premises, and prayed for a specific performance of the agreement. The action was tried by the court. Findings were duly filed, and judgment for the plaintiff was entered thereon, and this appeal is by the defendants from the judgment and an order denying their motion for a new trial.

The findings are very full, and cannot be inserted in this opinion, but an outline of the facts found may be thus stated: In August or September, 1887, the plaintiff and the defendant G. L. Dennison made a verbal agreement whereby plaintiff agreed to sell to Dennison a house and lot on Courthouse street in the city of Los Angeles, at a valuation of \$1,000,

to be paid for by the conveyance of four lots in "Dennison's subdivision of Fair Oaks Avenue Park tract in the Rancho San Pasqual," said lots to be taken at a valuation of \$1.000 each. Dennison shortly afterward went into possession of the house and lot. At the time of the agreement the survey and subdivision of Dennison's land had not been completed, but in January, 1888, plaintiff selected and marked upon the map the four lots described in the answer. No time was ever agreed upon when the mutual conveyances were to be made. At the time said agreement of exchange was made G. L. Dennison did not have title to said four lots, but held a contract of purchase of a larger tract of which they were a part, upon which he had made one payment, and was to obtain a deed only upon full payment; that he never made any other payment, but on October 30, 1888, conveyed all his right, title and interest in said premises to Lucius Dennison, who afterward—but at what date does not appear, except that it was prior to July 8, 1890—procured title to the tract of which these lots were a part; that between December, 1887, and the last of May, 1889, the plaintiff obtained from G. L. Dennison \$750 as loans, to be secured on said lots; that on July 8, 1890, plaintiff tendered to defendant G. L. Dennison a good and sufficient deed of conveyance of the house and lot, and demanded of Dennison payment of \$3,250, being the agreed value of the property, less \$750, the amount of said loans. Dennison refused to make such payment, and at the same time tendered to plaintiff a deed of conveyance of said four lots, executed by Lucius Dennison, but which deed the plaintiff refused to accept, the grantor therein being a stranger to the contract or agreement between plaintiff and G. L. Dennison. It was further found that on May 6, 1890, a judgment was rendered in the superior court of Los Angeles county against G. L. Dennison for \$20; that on September 25, 1890, one Marriner obtained a money judgment in said court against said G. L. Dennison for \$2,500; that on December 28, 1888, F. K. and O. M. Harriman foreclosed in said court a certain mortgage against said G. L. Dennison, and on March 29, 1889, a deficiency, judgment therein was docketed against said Dennison for \$2,174.55; that on September 27, 1890, in an action brought by said Harrimans in said court against said G. L. Dennison and Lucius Dennison, a decree

was entered adjudging the said conveyance so made by said G. L. Dennison to said Lucius Dennison of said tract embracing said four lots to be fraudulent as to creditors, and subjecting the same to the lien of said deficiency judgment. Lucius Dennison, the father, and Robert Dennison, the brother, and G. L., were occupants of the demanded premises with G. L., and were made defendants.

Respondent contends that he was not bound to accept a conveyance of the four lots from a stranger to the contract; that G. L. Dennison, by the conveyance of the lots in question to his father, put it out of his power to fulfill his contract with the plaintiff; that such conveyance was made without his consent; that under section 1457 of the Civil Code "the burden of an obligation may be transferred with the consent of the party entitled to its benefits, but not otherwise"; that by section 1731 of the Civil Code, "an agreement to sell real property binds the seller to execute a conveyance"; that, unless it was part of the agreement that it should bind the assigns of the parties, it could not bind them, and was merely a personal contract which could not pass to their assigns except by mutual agreement. In support of this contention respondent cites *La Rue v. Groezinger*, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 72. That case, however, clearly holds the general rule to be that contracts are assignable unless the contract provides otherwise, though the nature of some contracts may show that they cannot be assigned, though there is no language showing such intention, instances of which are stated in that case at page 285, 84 Cal., and page 72, 24 Pac. Of course, Dennison could not free himself from the burden or obligation of making a conveyance of these lots to the plaintiff without the plaintiff's consent, though either party could assign to another any benefit he was entitled to under the contract; that is, the plaintiff could assign to another his right to receive a conveyance of the four lots, and the defendant could assign his right to receive a conveyance of plaintiff's house and lot. The burden or obligation of each to make the conveyance may, however, be transferred or performed by another only with the consent of the party who is to receive such performance or conveyance. The reason therefor can be illustrated by this case. At the time the exchange of property was agreed upon, G. L. Denni-

son did not have the legal title to these lots. He had contracted for their purchase, and was to receive a conveyance upon making full payment therefor. Before obtaining title, he conveyed them, with other property, to his father, and thereafter the payments were completed, and the property was conveyed to his father. A deficiency judgment was afterward docketed against G. L., and a suit was commenced against him and his father to cancel or set aside said conveyance as fraudulent and void as against the creditors of G. L., and a decree was granted declaring such conveyance void as against said creditors. The implied covenants in a grant, bargain and sale deed from the father to the plaintiff would only reach to encumbrances done, made or suffered by the father, the grantor therein, and would not protect the plaintiff against encumbrances or liens suffered by G. L. Dennison, and the plaintiff was entitled to this implied covenant: Civ. Code, sec. 1113. No time having been fixed for the mutual conveyances to be made, the conveyance of these lots by G. L. Dennison to his father was not necessarily an abandonment of his contract with the plaintiff. He offered to prove that he had an agreement with his grantee that he, Lucius Dennison, would carry out the agreement with the plaintiff, and convey the four lots to the plaintiff. The plaintiff objected, and the objection was sustained. It does not appear that this agreement was communicated to the plaintiff, or that he assented thereto in any manner. The evidence was properly excluded, as was also the deed from Lucius Dennison to the plaintiff, upon the ground hereinbefore stated. Subsequently the defendant G. L. Dennison, during the trial, on the 7th of May, 1891, wrote upon said deed and executed and acknowledged the following: "I, G. L. Dennison, of said county and state, do hereby go in with the grantor herein in the written deed to A. W. Royal, of said county and state, and do by these presents grant, bargain and sell to A. W. Royal all my right, title and interest in and to the property described in the within deed, in consideration of exchange for house and lot No. 215 Court street, Los Angeles city and county." Whether this instrument was effectual for the purpose of binding G. L. Dennison by the implied covenants of a grant, bargain and sale deed, it is not necessary to inquire, since, on the 27th of September preceding, the conveyance

made by him to his father was adjudged fraudulent as against the plaintiffs therein, and the property was thereby made subject to the lien of the deficiency judgment hereinbefore noted, and which is not shown to have been satisfied. Whether the court erred in excluding the deed with the additional instrument executed by G. L. Dennison, at the stage of the case at which it was offered, need not be decided, inasmuch as the decree above referred to being afterward introduced rendered the exclusion, if it was error, harmless.

Appellants contend, however, that plaintiff's tender of a conveyance was not sufficient to put Dennison in default, because the tender was made upon the condition that he pay plaintiff \$3,250 in money; that under section 1494 of the Civil Code "an offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform"; and that he was not bound to pay for the property in money. But Dennison was not at the time of the tender by plaintiff, nor, indeed, had he ever been, the owner of the legal title to these lots, and therefore could not have complied with a demand for a conveyance of them. Under such circumstances, we think he cannot object to the form of the tender, or the condition attached to it, since he was not injured by the condition. His right to insist that the plaintiff should accept a conveyance of the lots was not affected by the fact that he did not have the legal title at the time he made the contract, nor by the fact that he afterward conveyed his equitable title to his father, provided he had procured the legal title before he was required to perform his contract by a conveyance. This case does not come within the case of *Burks v. Davies*, 85 Cal. 110, 20 Am. St. Rep. 213, 24 Pac. 613, where the defendant had no title to a part of the property, nor any contract for the purchase of it under which he could have compelled the owner to convey the title to him. The distinction between that case and the case at bar is clearly pointed out in *Easton v. Montgomery*, 90 Cal., at page 315, 25 Am. St. Rep. 123, 27 Pac. 280, as well as by the remark of Mr. Justice Paterson in the former case, where it was said: "If, though he be not the absolute owner, it is in his power by the ordinary course of law or equity to make himself such owner, he will be permitted within a reasonable time to do so." Whether, if Dennison in this case had ac-

quired the unencumbered legal title to these lots before the trial, he could have compelled a specific performance by the plaintiff, we need not consider, since the title was shown to have been subject to the judgment of Harriman, if not of others.

It is contended that these judgment-rolls were improperly admitted. We think not. It was competent for the plaintiff to show that the title was not free from encumbrances. This was certainly the case as to the Harriman judgment, and if the conveyance by G. L. to Lucius Dennison was fraudulent as to one creditor it was presumably so as to all; or, if that be not the case, since one was competent and material, and would have been entirely sufficient to justify the plaintiff in refusing to accept the title, the introduction of the others could not prejudice the defendants. The date of the commencement of the Harriman suit against G. L. and Lucius Dennison, as well as of the other actions, must have been shown by the judgment-rolls which were put in evidence, but by a singular omission the date at which these several actions were commenced, and especially of the Harriman suit to set aside the conveyance, nowhere appears in the record, since the commencement of that action was a direct attack upon the title of Lucius Dennison to these lots. Every point made by appellant in his attack upon the findings has been sufficiently covered by what has been said. The findings are justified by the evidence, and support the judgment. We find no error in the record which would justify a reversal of the judgment or order appealed from, and advise that they be affirmed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

PEOPLE v. CONNELLY.

No. 21,272; October 4, 1894.

38 Pac. 42.

Embezzlement—Instructions.—On a Trial for embezzlement, where no request is made to limit evidence of similar embezzlements by defendant to proof of criminal intent, a voluntary instruction that defendant is not on trial for embezzling any other sum than that charged in the information is not prejudicial because it fails to make such a limitation.

Embezzlement—Defense.—The Fact That an Appropriation of an employer's money was made without attempt at concealment is no defense to a charge of embezzlement.

APPEAL from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Patrick Connelly appeals from a conviction of embezzlement and from an order denying a new trial. Affirmed.

Lawler & Gray for appellant; Attorney General Hart for the people.

PER CURIAM.—The defendant was convicted of the crime of embezzlement, and appeals from the judgment and from an order denying his motion for a new trial. The information charges that defendant embezzled \$89.78, the property of M. Goodwin, which he had received from Vincent Leguns as the agent and collector of said Goodwin.

1. On the trial evidence was introduced on the part of the people, without objection, to prove that defendant had embezzled other sums of money which he had collected for Goodwin, amounting to more than \$5,000. As to this the court was not asked by either party to instruct the jury, but, of its own motion, instructed as follows: "Now, with reference to the matters outside—the five or six thousand dollars that has been spoken of—I charge you that the defendant here is not accused or on trial for embezzling any other sum than this money that was collected from Leguns; and, if you find that the defendant embezzled that money, why then you will find him

guilty; and by your verdict you must state the amount.” The verdict was that defendant was guilty of embezzling \$78.43. It is admitted that evidence of the embezzlement of other sums was properly admitted for the purpose of showing criminal intent, as was held in the case of *People v. Gray*, 66 Cal. 271, 5 Pac. 240. Nor is there any objection on the ground that the court voluntarily instructed on that point. But it is contended that the court erred in that it did not add to the instruction given that the evidence of other like embezzlements could be considered only for the purpose of proving the fraudulent or criminal intent with which the money received from Leguns was converted. If the instruction is defective in this respect, it is so to the advantage of the defendant, for the reason that the jury may have understood that they were instructed not to consider the evidence as to other embezzlements for any purpose, and could not otherwise have understood the instruction to the prejudice of the defendant. It seems to have been intended for the benefit of defendant, and, so far as it went, surely was so. If the defendant desired any addition to the instruction, he should have asked it.

2. The venue was sufficiently proved. The evidence contained in the bill of exceptions tends to prove that the money was received and converted by the defendant in the city and county of San Francisco, and should be deemed sufficient: *People v. Marks*, 72 Cal. 46, 13 Pac. 149; *People v. Leong Sing*, 77 Cal. 117, 19 Pac. 254; *People v. Carroll*, 80 Cal. 154, 22 Pac. 129; *People v. Tonielli*, 81 Cal. 279, 22 Pac. 678.

3. It is claimed that defendant was working for one-half of the profits on the sales made by him, and not for a definite commission, and therefore was interested in the business as a partner, and there was some evidence to this effect. But Mr. Goodwin testified positively that: “He was not working on profits at all. He was working on commissions on the amount sold. I am positive of that. The percentage of sales which he got as commission was seventeen per cent. . . . In estimating the amount of his commission, I did not take the cost price of the goods. It did not make any difference what the goods cost. We allowed him his commission of just seventeen per cent.”

4. It is further claimed that the undisputed testimony of defendant was that he was authorized to spend money at his discretion to build up the trade, but this is a mistake. He did not say he was authorized to spend money for that or any purpose. He simply said: 'The money, if any, that I was short was spent for the benefit of the house—building up the trade. I collected the money from Leguns on that bill. Q. Did you ever account to Mr. Goodwin for the money you had spent building up the trade? A. Oh, yes; what I would be short. What I was short when I would turn in—supposed to turn in—I would say, 'Charge so much to my account.' Can't remember whether I told them to charge the Leguns money to my account, or whether I paid it in.'

5. It is further contended that the money was appropriated by defendant openly, and without secrecy or concealment. While secrecy or concealment may be evidence tending to show a criminal intent, yet, if the evidence shows that the criminal acts constituting embezzlement were committed by the defendant, it is no defense that they were committed openly. The judgment and order are affirmed.

SMITH et al. v. SMITH.

No. 18,162; October 4, 1894.

38 Pac. 43.

Venue in Civil Cases—How Determined.—The nature of a cause of action, so far as it determines the venue, must be ascertained from the complaint alone, without considering any amendment which plaintiff may intend to make.

Venue—Action to Declare Deed a Mortgage.—A complaint asking that it be adjudged that certain deeds of land are mortgages, and that they have been paid, and that, if it be found that any part of the debt remains unpaid, plaintiffs be admitted to redeem, and that they be let into possession, states a local cause of action, which should be brought in the county in which the land lies.

APPEAL from Superior Court, Tuolumne County; John Hunt, Judge.

Action by E. H. Smith and others against Cyril C. Smith. From an order denying a change of venue defendant appeals. Affirmed.

J. C. Law (James H. Budd of counsel) for appellant; J. C. Campbell and F. D. Nicol for respondents.

VANCLIEF, C.—This is an appeal from an order denying defendant's motion to change the venue from Tuolumne county, where the action was commenced, to the county of Merced, where the defendant resided at the time the action was commenced, to wit, July 20, 1892. A former action by the same plaintiffs against the same defendant for the same and additional relief, and founded on the same and an additional cause of action, was commenced in Tuolumne county on July 20, 1891, in which defendant's motion to change the venue of that action to the county of Merced was denied, and upon appeal from the order denying the motion this court reversed the order, and directed the court below to grant the change (*Smith v. Smith*, 88 Cal. 572, 26 Pac. 356); but before the change of venue was granted by the lower court the plaintiffs dismissed the action, and thereafter commenced the action in which was made the order from which the present appeal was taken.

It is contended by appellant that substantially the same grounds for a change of venue appear to exist in this case as in the former, and that upon the authority of the decision of this court in the former case the order denying a change of venue in this case should be reversed. The substance of the complaint in the former action is stated in the opinion of the court on the appeal from the order in that action (88 Cal. 573, 26 Pac. 356), whereby it appears that that complaint stated both a local and a transitory cause of action—a cause of action to compel the defendant to convey to plaintiffs certain lands situate partly in Tuolumne county and partly in the county of Merced, and a cause of action to compel the defendant to account for money and other personal property alleged to have been received by him as partnership property of a firm composed of himself and one D. G. Smith, deceased, under the latter of whom the plaintiffs claimed an interest in the partnership property by inheritance. It was held on that

appeal that, inasmuch as the complaint stated a transitory as well as a local cause of action, the defendant was entitled to a change of venue to the county of Merced, in which he resided, the court saying: "The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. It is only when real estate alone is the subject matter of the action that the provisions of section 392 of the Code of Civil Procedure can be invoked against a defendant who resides in a county different from that in which the land is situated." The respondents claim that real estate alone is the subject matter of this subsequent action, from the order in which this appeal was taken; that the facts constituting a personal or transitory cause of action in the complaint considered on the former appeal are entirely absent from the complaint involved in this appeal. The substance of the complaint in this action is that on July 29, 1876, D. G. Smith, under whom plaintiffs claim by inheritance, was the owner of several thousand acres of land, of the value of \$200,000, situated partly in each of the counties of Tuolumne, Merced and San Luis Obispo, and was then indebted to defendant in the sum of \$31,000, and to other persons in the sum of \$33,000; that for the sole purpose of securing the payment of such indebtedness he then conveyed all said lands by deeds absolute on their face to the defendant, under a contemporaneous agreement with defendant that the deeds should be considered only mortgages; that defendant should take possession of the mortgaged property, and manage the same, and pay all the indebtedness to secure which the deeds were executed, and when all such indebtedness should be paid the defendant should reconvey to him (D. G. Smith) all said mortgaged real property; that all said deeds were made at the same time and as one transaction; that no other consideration passed between the parties than said agreement; that D. G. Smith died intestate February 2, 1883, and all the debts of his estate, including the debts of decedent to defendant and others to secure which said deeds were executed, have been fully paid and discharged; that ever since the twenty-ninth day of July, 1876, the defendant has had, and still has, the exclusive possession of said mortgaged lands, and during

all that time has received all the rents, issues and profits thereof, and that no part thereof has been administered upon as the estate of D. G. Smith, deceased; that defendant did not reconvey to D. G. Smith said mortgaged property, nor any part thereof, and upon their demand has refused to convey to the plaintiffs the undivided five-sixths thereof, to which they are entitled, or to admit them to the possession as tenants in common with him; and that the value of said mortgaged property is \$300,000. Allegations not pertinent to the question of venue, including those showing the heirship of the plaintiffs, are omitted. The prayer of the complaint is substantially that it be adjudged that said deeds are mortgages, and that they have been paid and satisfied; that plaintiffs are owners of five-sixths of the mortgaged land, and that they be let into possession as tenants in common with defendant; that, should it be found that any part of the mortgage debts remain unpaid, plaintiffs be permitted "to redeem from the mortgages simultaneously with the execution of conveyances of said real property to them by defendant"; and that plaintiffs have such other and further relief as may be proper.

By comparing this complaint with that in the former action it will be seen that all the facts of that complaint held to constitute a transitory cause of action have been omitted from this complaint, and this is admitted by counsel for appellant. But they claim that the affidavit of the defendant on which the motion was made shows that plaintiffs intend so to amend their complaint in this action that they may introduce proof of all the facts alleged in their former complaint. They say: "We do not claim that under the present form of the complaint in this action, without any amendment thereto, that plaintiffs could introduce such proofs." That affidavit, among other things, contains the following: "That the complaint in this action was drawn and this action commenced in its present form with the intent of preventing a transfer of this action to Merced county, and with the purpose of litigating and determining in this action under said complaint or amendments thereto all questions and matters that might have been litigated under the former complaints in the dismissed actions aforesaid. And it is plaintiffs' purpose to have litigated and determined in this action under the allegations of the complaint herein, or an amendment to the complaint herein, all

the questions as to the transfer of the aforementioned personal property from D. G. Smith to C. C. Smith, and the management thereof by C. C. Smith, that might have been or could be determined or litigated under a complaint in form of action No. 636 aforesaid." As to those statements in defendant's affidavit there was no counter-affidavit, and it is therefore claimed by appellant that defendant's affidavit must be taken as true. Whether the affidavit is true or not, I think the nature of the cause of action, so far as it affects or determines the place of trial, must be ascertained from the complaint alone. Nor are the cases cited by appellant's counsel opposed to this view. In each of those cases, viz., *Creditors v. Welch*, 55 Cal. 469, *Hastings v. Keller*, 69 Cal. 606, 11 Pac. 218, *McSherry v. Mining Co.*, 97 Cal. 637, 32 Pac. 711, the affidavits related to the place of residence of the defendant, which constitutes no part of a cause of action. I think the complaint in this case states only a local cause of action, which cannot be distinguished from that stated in the case of *Baker v. Insurance Co.*, 73 Cal. 182, 14 Pac. 686, which case was not overruled by the case of *Smith v. Smith*, 88 Cal. 572, 26 Pac. 356; and the lower court did not err in denying the motion to change the venue. What would be the effect of such an amendment of plaintiffs' complaint as anticipated by defendant is a question not involved in this appeal. Should it arise in the court below hereafter, it must be presumed that that court will properly dispose of it. I think the order should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

DOW v. NASON et al.

No. 19,329; October 4, 1894.

38 Pac. 54.

Note—Payment by Payee—Effect on Maker's Liability.—The payee of a note, in order to be able to have it discounted, induced another person to indorse it. An extension note, which was signed by the surety, but not by the maker, was paid, for the benefit of the surety, by the payee of the original note; and both notes were marked "Paid," and delivered to him. Held, that such payment did not extinguish the original maker's liability, as it was not by a mere volunteer.

On petition for a rehearing. Denied.

BEATTY, C. J.—In his petition for a rehearing, counsel for appellant complains that his position has been misunderstood and his points left undecided. As the opinion of the department is extremely brief, it will not be improper for me to state somewhat more fully the grounds upon which I concur in the order denying a rehearing. There is perhaps a slight verbal inaccuracy in that part of the opinion which states that the principal point in the case is whether the notes of H. W. Nason were paid. The question is rather whether they were so paid as to extinguish the indebtedness of H. W. Nason, and to restore to the plaintiff, as receiver of his estate, the ownership of the \$5,000 note, by which they were partly secured. The superior court found that they were not paid, but were assigned to the Pamo Water Company, with their collateral. In order to support the judgment, it is not necessary that the evidence should sustain this finding, in the broadest sense of its terms. It is sufficient if there is evidence to show that, although the notes were paid, they were paid under such circumstances as to work an assignment to the water company; and I think the evidence does fully sustain the finding, in this sense. These are the facts: Nason bought from the water company one thousand shares of its stock, and, in payment therefor, executed to Robinson, the president and trustee of the company, his note for \$7,500, pledging the \$5,000 note, which is in controversy here, as collateral security. The water company, being desirous of raising money, applied to the

California National Bank of San Diego to discount Nason's note, which the bank agreed to do, but only on condition that Wood and Jones, members of the corporation, should indorse the note as sureties. This they did for the benefit of the company, and the bank took an assignment of the note, with its collateral. Nason did not pay it when it became due, but, by consent of the bank, renewed it several times, the accrued interest being added to the principal, and Wood and Jones signing as sureties. The last of these renewal notes was signed by Wood and Jones as sureties, but, owing to the temporary absence of Nason from the state, was not signed by him. Pending his return the bank retained possession of it and the previous renewal note. Before Nason had an opportunity of signing the last note, the bank went into the hands of a receiver, and this accounts for the existence of two notes for the same indebtedness. One of the points contended for by appellant was that one payment of this indebtedness extinguished both notes, and he complains that this point was overlooked. It was not necessary to notice this point, for the simple reason that there appears to be no controversy as to the fact that both notes were paid in the same sense. But the question, and the only material question, in the case, is whether they were so paid as to extinguish the indebtedness of Nason. Payment was made by the water company to the receiver of the bank. Both notes were marked "Paid," and delivered to the water company by the receiver, who at the same time transferred to the company the \$5,000 note held as collateral. The contention of appellant is that the water company made this payment as a mere volunteer, and that the effect was to extinguish the indebtedness of Nason. He bases this contention upon the legal proposition that no man can be made debtor for money paid to his use unless he has requested the payment. But the fault in this argument is that the water company was not a volunteer. The sureties on the notes had become such for its benefit and accommodation. It was under a moral obligation certainly, and perhaps legally bound, to protect or reimburse them; and the circumstances under which it paid the notes fully warrant the conclusion that the payment was made in their behalf, and for their benefit. It was payment by one who was virtually, though not nominally, Nason's surety; and neither he nor his successor has any right to question the

arrangement under which the company has merely discharged its own obligation, for really there is no substantial merit or equity in the claim of appellant, seeking, as he does, to reap where he has not sown, or, in other words, to subject another to loss in order that he may gain. In this view the findings of the superior court as to nonpayment and assignment of Nason's notes are fully sustained. They were paid as to the bank, but not as between Nason and the water company. They were not assigned to the water company by the receiver of the bank, but the water company was subrogated to the rights of the bank, and the collateral security transferred by the statute: Civ. Code, sec. 2349. This being so, the question as to the authority of the bank's receiver to assign the note becomes wholly immaterial.

WONG LANG v. ALASKA IMP. CO.

No. 15,575; October 30, 1894.

38 Pac. 104.

Action for Services—Conflicting Evidence.—In an action for labor in defendant's fish cannery, defendant's testimony was that the balance claimed by plaintiff was covered by a charge against him for defective canning, in accordance with the contract, and that plaintiff had signed a receipt in full, which was read to him before he signed it. Plaintiff's testimony was that the defective canning was due to defective machinery; that plaintiff could not read writing in the English language; that the receipt was not read to him at the time he signed it; that he supposed he was signing only for a payment which he then received. Held, that a verdict for plaintiff will not be disturbed.

APPEAL from Superior Court, City and County of San Francisco; Charles W. Slack, Judge.

Action by Wong Lang against Alaska Improvement Company on contract. From a judgment rendered on a verdict for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Daniel Titus for appellant; Reddy, Campbell & Metson for respondent.

VANCLIEF, C.—The action is upon a written agreement between plaintiff and defendant, whereby the plaintiff, in consideration of certain specified payments to be made by the defendant, agreed to do and cause to be done, by himself and about ninety other Chinamen, to be employed by him, certain labor in and about the fish cannery of defendant during the fishing season of 1891; and thereupon it is alleged in the complaint “that plaintiff fully and faithfully performed each and every of the covenants on his part in said agreement contained, and that on the twenty-third day of November, 1891, there became due and payable to plaintiff, under and in accordance with the terms of said agreement, for and on account of said performance on his part, the sum of \$23,775”; and it is further alleged that defendant has paid plaintiff only \$21,155 on account, leaving still due, owing and unpaid, \$2,620, for which plaintiff prays judgment. The defendant, by answer, denied that plaintiff had fully performed his contract, and denied that any sum was due, owing or unpaid to plaintiff; alleged full payment of the amount found due according to the terms of the agreement upon an accounting and settlement between plaintiff and defendant, for which payment the plaintiff indorsed upon the agreement a receipt in full of all demands under the agreement. The jury returned a verdict in favor of plaintiff for the sum of \$1,310, upon which judgment for this sum was rendered in favor of plaintiff. Defendant appeals from the judgment and from an order denying its motion for a new trial.

The only point made by appellant is that the verdict of the jury is not justified by the evidence. Although the transcript of the evidence brought up in the bill of exceptions seems to show a considerable preponderance of evidence, in number of witnesses at least, in favor of the defendant, yet I think it clear that the evidence for plaintiff substantially tends to prove all the issues on his part, and is *prima facie* sufficient to justify the verdict. That the verdict of a jury will not be set aside by this court on the ground that it appears to be against a mere preponderance of evidence is too well settled to require citation of authorities. The defendant’s ledger account with plaintiff was put in evidence, and shows that plaintiff was credited with \$23,775, which was balanced by charges, the last item of which is as follows: “Nov., 1891, Dr.,

to reclamation as per settlement, \$1,312.55." It is claimed by defendant that this charge was properly made under that clause of the agreement which provides that plaintiff "shall be allowed a percentage of four per cent for all 'do-overs' and mended cans, but all do-overs in excess of four per cent shall be charged" to him at the rate of ten cents per can. The term "do-overs" means the cans of fish which have been so imperfectly closed that they leak, and therefore must be re-canned—done over. The whole controversy relates to this item of \$1,312.55 charged to plaintiff for "do-overs" in excess of four per cent. Another part of the agreement required the defendant "to furnish all materials necessary for the manufacturing of cans and packing of salmon, . . . to keep the machinery in running order, and to furnish the necessary and experienced and skillful men to look after the same on their part." Plaintiff contended and testified that the "do-overs" in excess of four per cent were the effect of defective machinery, and the failure of defendant to keep the machinery in running order, or to furnish skillful men for that purpose, and were not caused by any negligence or want of skill on the part of the plaintiff; and as to this plaintiff's testimony was corroborated by that of Eugene Amiot, an apparently disinterested witness, and was undisputed, except by the testimony of Mr. Barling, a stockholder of defendant, and superintendent of the cannery, who admitted that the machinery was imperfect, and spoiled a great many cans, yet claimed that it worked ordinarily well. Nor is it distinctly contended by counsel for appellant that the evidence is not substantially conflicting upon this issue. The principal controversy relates to the alleged settlement, which is denied by the plaintiff. There is no question, however, that plaintiff signed the receipt in full, which is indorsed on the contract as alleged in the answer; but he testified at the trial that he could not read writing in the English language; that the receipt was not read nor explained to him; that at the time he signed it there had been no settlement to the effect that any charge should be made or allowed against him for "do-overs"; that he was told and understood that the receipt was for only the amount (\$10,000) then paid him on account, to enable him to pay off the Chinamen who had worked for him in defendant's cannery, and who were clamoring for their pay; and that he would not have

signed it had he known it was a receipt in full of all his demands under the contract. Four witnesses, who were stockholders of the defendant corporation, testified that the charge for the "do-overs" was the result of a settlement to which plaintiff assented, and that the receipt was read to plaintiff before he signed it. The plaintiff was subjected to a long and searching cross-examination, by which it is claimed that some inconsistencies in his testimony tending to impeach its credibility were shown. But the alleged inconsistencies relate principally to collateral matters, as to who were present, and what was said on two different occasions, and may be accounted for, I think, without prejudice to the credibility of his testimony, by his imperfect knowledge of the English language, in which he testified. As to the principal and only material matters—the alleged settlement and receipt—his testimony was self-consistent and positive, and was flatly contradicted by the witnesses for defendant. This, I think, constitutes a case of substantial conflict. The jury must have believed the testimony of the plaintiff, and the lower court was satisfied with the verdict; and, though counsel invite attention to the fact that the witnesses for defendant are white men, he does not claim that the jury was prejudiced against them on that account. I think the judgment and order should be affirmed.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

SILVA v. SILVA.

No. 15,623; October 31, 1894.

38 Pac. 105.

New Trial—Newly Discovered Evidence.—Where, on appeal, no affidavit to support a motion for a new trial on the ground of newly discovered evidence is identified as used on the hearing of the motion, and the affidavits in the transcript show that the alleged new evidence is merely cumulative, and would not probably effect a different result on a new trial, the denial of such motion will be affirmed.

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Frank Silva against Maria C. Silva to establish a trust in land. From a judgment for defendant, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

John F. Burris and Moses G. Cobb (Stephen G. Nye of counsel) for appellant; R. B. Tappan for respondent.

VANCLIEF, C.—It is alleged in the complaint in this action that the defendant holds a certain lot of land in trust for the plaintiff, and prays that it be so adjudged by the court. The answer of the defendant is a denial of the alleged trust. Judgment passed for defendant. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

A careful reading of the transcript of one hundred pages and sixty pages of briefs for appellant has led me to the conclusion that the appeal is totally destitute of merit. In limine, counsel for appellant complain that the court erred in substituting for their statement of the evidence an "epitome" of the stenographic report thereof, which does not fully nor truly represent it. But of this there is not the slightest evidence in the statement or bill of exceptions on which the motion for new trial was made. It does not appear, even, that appellant's original statement of the evidence was amended or changed in any respect. One of the grounds of the motion, as stated in the notice of the motion, was newly discovered evidence, and it is contended that the court erred in not granting the motion on this ground. But, in the first place, no affidavit to prove this ground of the motion is properly identified as having been used or read on the hearing of the motion; and, in the second place, the affidavits printed in the transcript show that the alleged newly discovered evidence was merely cumulative to that introduced by plaintiff on the trial; and, furthermore, that it probably would not effect a different result on a new trial. It is contended that the findings of fact are not justified by the evidence. But the evidence appears to be amply sufficient to justify the findings in all particulars in which they

are excepted to in appellant's brief. Nor does the statement contain any intelligible specification of any error in law committed at the trial. Yet all the points made under this head in appellant's brief have been considered, with the result that no such error is made to appear. I think the order and judgment should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

WHITMORE et al. v. AINSWORTH et al.

No. 15,547; November 2, 1894.

38 Pac. 196.

Vendor and Vendee—Possession as Notice.—Where, in an action by a grantor against the grantee to set aside a deed for fraud, the findings are for the defendant, the question whether possession by the grantor operated as notice to subsequent purchasers is immaterial.

Witness.—A Question Whether Defendant Wanted Plaintiff "to do anything" at a certain time was rightly excluded as calling for a conclusion.

Vendor and Vendee—Evidence of.—**Attempt to Take Possession.**—A paper executed by defendant, authorizing his agent to take possession of certain premises, is admissible to prove defendant's attempt to take possession thereof.

APPEAL from Superior Court, Alameda County; F. W. Henshaw, Judge.

Action by Charlotte S. Jones against A. G. Ainsworth and others to set aside and annul a deed for fraud and want of consideration. Plaintiff having died before the trial, her executors, Welles Whitmore and Cary Howard, were substituted as plaintiffs. Judgment for defendants. From an order denying their motion for a new trial, plaintiffs appeal. Affirmed.

Whitmore & Stoddart, Welles Whitmore, Cary Howard and M. C. Chapman for appellants; C. L. Calvin and T. F. Graber for respondents,

SEARLS, C.—This is an action brought to set aside and annul a deed executed on or about July 26, 1890, by Charlotte S. Jones to the defendant A. G. Ainsworth, upon the grounds that the same was without consideration, fraudulent and void. Defendants had judgment, from which, and from an order denying their motion for a new trial, plaintiffs appeal.

The action was commenced in the name of Charlotte S. Jones as plaintiff, who departed this life before the trial, and the present plaintiffs, the executors of her last will, were thereupon substituted as plaintiffs in the cause. A synopsis of the complaint may be thus stated: (1) On the twenty-second day of July, 1890, Charlotte S. Jones, the plaintiff, acquired a legal title to the lot of land described in the complaint by deed from Welles Whitmore. (2) Plaintiff was at the time a servant of defendant, who went with her, on the twenty-sixth day of July, to the office of Whitmore, for the purpose of receiving said deed, and thence to the office of the county recorder, where defendant represented to plaintiff that, in order to have said deed recorded, it was necessary for her to acknowledge it; and plaintiff, believing this statement to be true, made, as she supposed, such acknowledgment, but in fact acknowledged a fraudulent deed, which defendant had prepared from her to himself of the property. (3) That there was no consideration therefor. (4) That plaintiff was able to write, but said deed to the defendant was signed with plaintiff's mark: (5) That the deed was not made, signed, executed or acknowledged by plaintiff, and if her name is signed thereto it is a forgery. (6) Plaintiff was old, feeble and unacquainted with business, and defendant, well knowing that fact, took advantage of her incapacity, fraudulently procured her to acknowledge said deed, which he recorded, and now claims to be the owner of said lot of land. There are also allegations to the effect that defendant afterward executed a mortgage upon the lot to the Oakland Bank of Savings to secure the payment of \$400, which mortgage was duly recorded. That the said bank took with notice and knowledge of the ownership and possession of plaintiff in and to said land, etc. Defendant's answer denies that

the deed from plaintiff to him was without consideration, and denies all fraud in its procurement. It further sets out that in July, 1890, Welles Whitmore had title and possession of the lot of land in question under a deed of conveyance from plaintiff, claiming to hold it as security for \$175 asserted to be due him from plaintiff; that plaintiff was desirous of redeeming the same from Whitmore, but was unable to procure the means so to do; that plaintiff and defendant thereupon entered into an agreement whereby the latter agreed to and did advance the money to pay Whitmore, and to support, maintain and care for plaintiff, and to furnish her all the necessities of life, including board, lodging, clothing, medical attendance, etc., during the full period of her natural life, to pay her lodge, insurance and society dues and assessments, in return for which plaintiff agreed to convey to him by deed absolute the title in fee to the lot of land in question; that in pursuance of said agreement defendant advanced the money, paid Whitmore, who conveyed to plaintiff, and the latter then conveyed to defendant the said lot, and placed him in possession; that defendant complied with all the conditions of the agreement to be by him kept and performed, etc. Defendant also incorporates in his answer, and makes a part thereof, an affidavit, made and duly certified before a notary public by the plaintiff, in which she states that she is old, feeble and without near relatives; that defendant and his family have been her friends; that defendant advanced the money to pay Whitmore, and that she then knowingly and voluntarily executed and acknowledged the conveyance to defendant, who has faithfully kept his agreement with her; that the allegations of fraud in her complaint are untrue; that she never authorized this action, never read or heard the complaint read, and was not aware of its contents, and knew nothing of its being filed, paid no costs or fees, and directs that the same be dismissed at once.

At the trial Rachel C. Quinn was called as a witness on behalf of plaintiff, and had testified as to a conversation which occurred between plaintiff and defendant, when the following question was propounded to the witness: "Q. State whether or not he [defendant] wanted her [plaintiff] to do anything or not at that time." To which counsel for defendant objected "upon the ground that it called for the conclusion of

the witness." The objection was sustained, an exception noted, and the ruling is assigned as error. The record shows that the court permitted the witness to testify, and she did testify at length, to the conversation between the parties, and finally, that defendant had a paper he wanted plaintiff to sign. No doubt this was precisely what plaintiff desired to prove in answer to his question. Whether it was or not, the action of the court in confining the witness to a statement of facts as they occurred, rather than to an expression of her opinion of what was wanted, was proper.

Thomas T. Jones was called by the plaintiff as a witness, and, after testifying that plaintiff was his wife, said he went to the house where his wife died, on the day of the funeral, to take possession of the place; that he had a paper with him, which he produced, and which he said he tried to show to Mrs. Rachel C. Quinn, but she would not look at it. On cross-examination the paper was offered in evidence, and proved to be an authorization to witness from defendant as owner to take possession of the premises in which his wife had died, and to hold the same until further arrangements. To this document objections were made, and the ruling admitting it is assigned as error. The evident object of the plaintiff in introducing the witness was to prove by him that he was seeking to take possession of the property in dispute, where plaintiff had died, for and on behalf of the defendant. The paper in question was the authority under which witness acted, and as such was competent evidence.

The other errors assigned upon the admission of evidence are not more important, and are as destitute of foundation as those noticed, and, as they relate to the testimony of defendant, they need not be noticed. The fact is, the testimony on the part of the plaintiff failed most signally to sustain the allegations of fraud set up in the complaint. Treated liberally, and the most that can be said of it is that it raised a suspicion as to the good faith of the defendant in some of the transactions. Had the court granted a nonsuit as asked for by defendant, its action could have been sustained. The findings are supported by the evidence. The only one upon which any doubt should be predicated is that in relation to the possession by defendant of the land in dispute; and of this it may be said: (1) There was a conflict in the evidence. (2) The

question of possession, in view of the findings that there was no fraud on the part of defendant, became wholly unimportant. If he purchased the land in good faith for a valuable consideration and received a deed of conveyance thereof in due form from plaintiff, he was entitled to the possession; and, whether he had such possession or not, he could execute a valid mortgage thereon to the Oakland Bank of Savings. It is only where the title is defective, or where equities exist in favor of the grantor or others, that possession by the grantor is notice to subsequent purchasers. In other words, possession by the grantor after a conveyance is notice to subsequent purchasers of any defects which may exist in the title, sufficient to put a subsequent purchaser upon inquiry; but, if such inquiry results in showing a perfect title in the grantee, the subsequent purchaser cannot be made to suffer by reason of his immediate grantor not having been in possession. The judgment and order appealed from should be affirmed.

We concur: Temple, C.; Vanelief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

PEOPLE v. BUTTON.*

No. 21,127; November 2, 1894.

38 Pac. 200.

Homicide — Self-defense—Withdrawal from Combat.—Penal Code, section 197, provides that to constitute justifiable homicide, if defendant was the assailant in a mortal combat, he must in good faith have endeavored to decline any further struggle before the homicide was committed. Held, that where one accused of murder commenced the combat, but in good faith tried to withdraw before the homicide, and was followed by deceased, who continued the combat, the fact that deceased, by reason of injuries sustained at defendant's hands, was unable to realize that defendant sought to withdraw, does not

*For subsequent opinion in bank, see 106 Cal. 628, 46 Am. St. Rep. 259, 28 L. R. A. 591, 39 Pac. 1073.

limit the right of defendant to claim that the killing was done in self-defense.

Homicide—Self-defense—Withdrawal from Combat.—If it was defendant's purpose in good faith to withdraw from the combat, and he endeavored to do so, it is not necessary to his justification that the conflict should have actually ceased, or that there should have been such an interval as would divide it into two different combats.

APPEAL from Superior Court, San Bernardino County; George E. Otis, Judge.

Charles Button was convicted of manslaughter, and appeals. Reversed.

Byron Waters and Wm. A. Harris for appellant; W. H. H. Hart and Frank F. Oster for the people.

HAYNES, C.—An information was filed against Button, charging him with the murder of Gustav Bohm, and upon the trial he was found guilty of manslaughter. His motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial.

Some exceptions were reserved to evidence, but the principal questions arise upon the instructions to the jury and the sufficiency of the evidence as matter of law to sustain the verdict. The deceased died from a gunshot wound inflicted by the defendant. Very shortly before the shooting angry words had passed between the parties, and at that time the defendant stamped or kicked the deceased in the face. The injury inflicted by defendant upon Bohm's face when he stamped upon it was fully described by the physicians, and doubtless was of a very serious character, breaking down the left cheek-bone and injuring the left eye, so that, in the opinion of the physician, the possibility of sight in that eye was excluded, and that the tendency would be to affect the other eye, both in co-ordination of movement and vision. The doctor was then asked by the district attorney: "What faculties would it affect, in your opinion?" Defendant's objection that it was incompetent, irrelevant and immaterial was overruled, and the witness answered: "It would affect more particularly his brain, and his mental faculties, and his vision, and sense of smell, and the guidance and direction of his eyes

or eye to a particular spot, or for any particular purpose." The same witness was asked the further question: "Would that, in your opinion, affect a man's impressions of things around him?" An objection to this question was also overruled, and the witness answered, "Yes, sir." Other questions were permitted, and answers received, of like character. In this connection one of the instructions given to the jury may properly be considered, inasmuch as it is based on this evidence of the mental condition of Bohm. The defendant requested the court to give the following instruction: "One who has sought a combat for the purpose of taking advantage of another may afterward endeavor to decline any further struggle, and if he really and in good faith does so before killing the person with whom he sought the combat for such purpose, he may justify the killing on the same grounds as he might if he had not originally sought such combat for such purpose." The court modified said instruction, and gave it as modified by the addition of the following: "Provided, that you also believe that his endeavor was of such a character, and so indicated, as to have reasonably assured a reasonable man that he was endeavoring in good faith to decline further combat, unless you further believe that in the same combat in which the fatal shot was fired, and prior to the defendant endeavoring to cease further attack or quarrel, the deceased received at the hands of the defendant such injuries as deprived him of his reason or his capacity to receive impressions regarding defendant's design and endeavor to cease further combat." The court also gave the following instructions: "But, even though the jury should be satisfied that the defendant, after such assault, and before firing the fatal shot, did really and in good faith endeavor to decline any further struggle, and to abandon the conflict, and that the defendant, at the time he fired the fatal shot, had reason to fear and did fear that the deceased meant to take his life, and acted under the influence of such fears alone, yet if you also believe that in such assault the defendant, by his own act, had put the deceased into such a condition that the defendant could not make the deceased understand that the defendant desired to withdraw from the conflict, you must not acquit the defendant." The modification of the first of these instructions and the qualification in the second commencing with the word "yet"

were erroneous. If, under the circumstances existing at the moment of the homicide, the deceased had killed the defendant, and he had been on trial for murder, there might have been some pertinency to these instructions. If the defendant, being the first aggressor, had declined further combat, as stated in the first part of the instruction, he is placed, so far as the law of self-defense is concerned, in the same position as though there had been no prior combat; and, that being true, the mental or other condition of the deceased could not affect his right of self-defense, even though such condition, if the deceased had slain the defendant, would have excused the homicide. If a confirmed lunatic, so completely bereft of reason as to make him wholly irresponsible for his acts, is about to take my life, may I not, when it is necessary for the preservation of my own life, take his? Must I be placed where I have no alternative but to accept death at his hands, or be hanged for murder? Section 197 of the Penal Code defines justifiable homicide. So much of subdivision 3 of that section as is pertinent is as follows: "But such person or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed." This section makes the justification to depend wholly upon the endeavor of the defendant in good faith to decline any further struggle, and not upon the mental or other condition of the deceased; nor, if such condition was not normal, upon whether it was caused by the defendant. It follows from these considerations that the evidence of the physician as to the effect of the injury upon the mental or other condition of the deceased was improperly admitted.

Another instruction requested by the defendant was modified by the court, and, given as modified, is as follows (the modification being in italics): "If you believe from the testimony in this case that the defendant committed an assault upon the deceased by kicking him, and then left him with the intention of doing him no further harm; that after committing such assault he went after his horse, and saddled him, with the purpose of leaving the party, to avoid further trouble, and that other members of the party endeavored to persuade him to remain, and that while he and they were so engaged the

deceased picked up his own gun, pointed and snapped it at defendant, and then pumped or attempted to pump a cartridge into it, and that he again pointed it at defendant, and that then defendant fired the fatal shot; *and you further believe that the first assault and the second were substantially distinct transactions*—you must acquit the defendant, whether you think the assault by kicking was justifiable or not.” In another instruction upon the same subject the following qualification was inserted: “And that after the first assault had ceased, and there had an interval elapsed between said first assault and the final assault, making said assaults respectively, although in some degree related to each other, yet substantially distinct transactions, each attended with its own separate circumstances, and the deceased procured his gun, and made such an attempt to shoot the defendant,” etc., stating circumstances which would justify the homicide. Each of these modifications imposes upon the defendant conditions not required by the statute. They required the jury to find as matter of fact, in order to justify the homicide, that there were two substantially distinct transactions; that is, that the transaction immediately connected with the shooting of the deceased, though if considered by itself it would have justified the defendant, could not justify him unless it was substantially distinct from the assault made by defendant before he went for his horse. The interval between the two occurrences is not important simply as it may serve to mark two occurrences or transactions instead of one, but also because what occurred in the interval, as well as the interval itself, when shown to be voluntary, marks a withdrawal from the conflict, and furnishes evidence tending to show the purpose and intent of the defendant not to renew it. If there was such purpose and intent on the part of defendant in good faith to withdraw from the conflict, and in like good faith he endeavored to do so, it is not necessary to his justification that the conflict should have actually ceased, or that there should be an interval sufficient to divide it into two substantially distinct transactions. It was impossible for the jury to acquit under these instructions, unless they concluded that there were two transactions instead of one.

In *People v. Gonzales*, 71 Cal. 577, 12 Pac. 783, it is said: “The tenth instruction does not enunciate a correct proposition of law where it declares that one ‘cannot in any case

justify killing another by a pretense of necessity, unless he was wholly without fault in bringing that necessity on himself"; for cases may, and frequently do, occur in which the aggressor, although primarily in fault, has really and in good faith sought to avoid further conflict before the mortal blow was given, and when this is apparent, and he slay his antagonist in the necessary defense of his own life, he is not guilty of any crime": See, also, *People v. Bush*, 65 Cal. 129, 3 Pac. 590; *People v. Robertson*, 67 Cal. 649, 8 Pac. 600; *People v. Simons*, 60 Cal. 72.

In the seventh instruction given at the request of the prosecution it was said: "That, in order to determine whether any such attempted withdrawal was in good faith, the jury are to take into consideration all the surrounding circumstances, the situation and relation of the parties; and the conduct of the party intending to thus withdraw must be unequivocal, and so marked in the matter of time, place and circumstance as to clearly evince the withdrawal of the accused from the combat." It is argued by appellant that, the evidence on the part of the prosecution having tended to show that the homicide was justifiable, the burden of proof was not upon the defendant to prove his justification, and cites Penal Code, section 1105. The court did not refer in this instruction to the question as to where the burden of proof rested. An instruction substantially in the language of that section had before been given without comment. This instruction said: "The conduct of the party must be unequivocal and clearly evince the withdrawal." The first part of the instruction is unobjectionable, but it may be questioned whether the latter part does not conflict with *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549, and other cases following that, down to *People v. Hawes*, 98 Cal. 653, 33 Pac. 791. *People v. Bushton*, *supra*, overruled *People v. Ah Duck*, 61 Cal. 395, and *People v. Raten*, 63 Cal. 422, which held that the burden was upon the defendant to show by a preponderance of evidence circumstances of mitigation or justification. In *People v. Bushton*, *supra*, it was said of section 1105, Penal Code: "This does not mean that he must prove such circumstances by a preponderance of evidence, but that the presumption that the killing was felonious arises from the mere proof by the prosecution of the homicide, and the burden of proving circumstances of mitigation, etc.,

is thereby cast upon him. He is only bound, under this rule, to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged. . . . The well-settled rule that a defendant shall not be convicted unless the evidence proves his guilt beyond a reasonable doubt applies to the whole and every material part of the case, no matter whether it is as to the act of killing or the reason for or manner of its commission. . . . The jury should have been instructed that the burden of proving circumstances of mitigation, or that justified or excused the killing, devolved upon the defendant, but that if, upon the whole case, they entertained a reasonable doubt from the evidence as to his guilt, he should be acquitted. Any other rule as to the weight of the evidence makes one measure applicable to one part of the case and a different one to another part, and leads to confusion": See, also, *People v. Elliott*, 80 Cal. 305, 22 Pac. 207; *People v. Lanagan*, 81 Cal. 143, 22 Pac. 482; *People v. Carroll*, 92 Cal. 572, 28 Pac. 600; *People v. Hawes*, 98 Cal. 653, 33 Pac. 791.

Appellant's contention that a new trial should have been granted because of the insufficiency of the evidence, and that the judgment should be reversed, with a direction to the court below to discharge the defendant, need not be considered. There is no doubt of the power of the appellate court to decide, as matter of law, that a given state of facts does not show that an offense has been committed; but it is a power that should be cautiously exercised, inasmuch as even in an apparently clear case this court cannot know but that upon another trial additional evidence tending to show guilt may be obtained. Except in rare cases, the question whether the defendant should be discharged is properly left to the trial court, unprejudiced by any expression of opinion by this court. For the other reasons hereinbefore stated the judgment and order appealed from should be reversed and a new trial granted.

We concur: Searls, C.; Vancielief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial granted.

MILLETT et al. v. LAGOMARSINO et al.*

No. 15,586; November 23, 1894.

38 Pac. 308.

Adverse Possession—Notice.—In 1873 Plaintiffs' Grantor Entered into possession of a number of lots, including the one in controversy, under a three-year lease, and retained possession of them till 1892. In 1882 he received a deed to the lot in question from a tax sale purchaser thereof, which was duly recorded, but he performed no act to change the character of his possession, and gave no notice that it was hostile. Before 1882 the lot was used by him as a cow pasture, in subordination to the owner's title. Held, that such possession did not constitute notice to the owner of said lot of the adverse character thereof.

Quieting Title—Res Judicata.—A Judgment Rendered in an Action for an unlawful entry of certain lands has no effect upon a subsequent action between the same parties to quiet title to said lands.¹

Quieting Title—Pleading.—It is not Necessary for Plaintiff in an action to quiet title to certain lands to allege the source of such title, although his title was acquired by adverse possession.

Adverse Possession—Notice.—The Record of a Deed from the Owner of the tax title to one already in possession under permission of the owner does not affect the owner with notice that the possession of the grantee thereafter is adverse to his title.

APPEAL from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Martin M. Millett and others against Thomas Lagomarsino and others to quiet title to certain land. Judgment for plaintiffs and defendants appeal. Reversed.

Nowlin & Fassett for appellants; Nagle & Nagle for respondents.

HAYNES, C.—This action was brought by the plaintiffs to quiet title to lot 2 in block 22 of the "City Extension Home-

*For subsequent opinion in bank, see 107 Cal. 102, 40 Pac. 25.

¹ Cited in the note in 112 Am. St. Rep. 40, on effect of judgment against tenant as res judicata.

stead Association," at some place not named either in the pleadings or judgment otherwise than that it is in the county of San Mateo. The complaint is in the usual form, alleging that plaintiffs are the owners in fee, and entitled to the possession. The answer denies the ownership and title of the plaintiffs, and alleges title in John B. Cronan, one of the defendants, and that Lagomarsino is in possession under a contract of purchase upon which partial payments had been made, and that he had erected a dwelling-house thereon. The court made the general finding that all the allegations of the complaint are true and the allegations of the answer untrue, and entered a decree quieting plaintiffs' title, and awarding them possession. The defendants appeal from the judgment and an order denying a new trial.

The lot in question is one hundred feet square, and is one of many lots comprising together about ten acres, which, with other lands, were subdivided by said association (a corporation) prior to 1873. Plaintiffs claim title by adverse possession, and whether they have such title is the ultimate question. In November, 1873, Michael Millett, the grantor of plaintiffs, entered into possession of the ten acres above mentioned, under a lease for three years, executed by McNear and nine others, owners of lots, McNear being then president of the association. The whole ten acres were inclosed by a fence, none of the lots therein being separately fenced. The lot in question was sold and conveyed by the association in 1870 to John Tenney, under whom defendants claim, but Tenney did not sign the lease. Defendants claim that the possession so taken by Millett of the whole parcel was continued from that time until he conveyed to the plaintiffs in March, 1892. Tenney conveyed the lot in question to defendant Cronan in August, 1889, and Lagomarsino entered under him in the latter part of 1890, or early part of 1891, and built a house thereon; and Michael Millett conveyed by quitclaim to the plaintiffs March 14, 1892. On July 24, 1882, Jason Wight executed and delivered to Michael Millett a quitclaim deed of said lot, Wight claiming to have purchased it at a sale for delinquent taxes in February, 1878. The only evidence that a tax deed was ever issued to him was the assessment-roll, showing the lot assessed to John Tierney (not Tenney), and the tax-sale book, in which was a memorandum that "deed issued March 6, 1879."

That deed was not produced and was not recorded, and Wight testified that he did not remember about the deed. Plaintiffs, however, do not claim that Wight's deed conveyed a title, but that the deed constituted color of title under which Millett held adverse possession. That Millett obtained possession of the lot in question under the lease as tenant of the whole parcel is clear from his own testimony, and that he was never out of possession until he conveyed to the plaintiffs is also clear. That the lease was void as to this lot makes no difference. "He who enters under a void lease is estopped equally with him who holds under a valid instrument": *Mauldin v. Cox*, 67 Cal. 393, 7 Pac. 804.

Appellants contend that Millett, having entered under a lease, or by permission of the owner, cannot initiate an adverse possession without first surrendering possession; and cite *Tewksbury v. Magraff*, 33 Cal. 244, *Hussman v. Wilke*, 50 Cal. 250, and *Standley v. Stephens*, 66 Cal. 541, 6 Pac. 420. In reply respondents contend that the lease expired in November, 1876, and that after five years from the expiration of the lease the presumption declared by section 326 of the Code of Civil Procedure, that the possession of the tenant is the possession of the landlord, ceases, and that Millett had the right then to commence an adverse possession without first surrendering possession. The five years succeeding the termination of the lease ended in November, 1881, but Millett testified that he did not commence to hold adversely until he obtained the deed from Wight, in July, 1882. His possession prior to July, 1882, could not have affected the owner with notice of that which did not exist, viz., an adverse holding; and therefore it must appear that at or after that time Tenney had such notice of an adverse holding as would set the statute in motion. Respondents assert that the record of the deed from Wight was notice of the adverse claim. But it does not appear that Tenney had any knowledge that such deed was in existence, or had been recorded, and its record was not constructive notice to him. Section 1213 of the Civil Code is as follows: "Every conveyance of real property, . . . from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees." The owner is neither a subsequent purchaser nor mortgagee, and is not

only not within the above code provision, but is under no obligation or duty to watch the records for conveyances made by a stranger to the title.

The question, then, is whether the possession was of such character as to be notice to the owner that it was adverse. At some time, not definitely fixed, probably in 1883 or 1884, the ten acres seem to have been divided, and thereafter Millett remained in possession of one part, containing about five acres, including said lot No. 2. The principal use of the inclosed parcel, both before and after the division, was for a cow pasture, though it was sometimes cultivated. None of the lots were separately marked off, inclosed or improved. No one lived upon any part of it. No change in the character of the possession or the use of the property took place. Millett owned some of the lots inclosed, De Forest owned at least one lot, and there were several streets within the five-acre inclosure. The plat of the subdivision with the lots, blocks, and streets had been duly recorded in 1870, prior to Tenney's purchase of the lot in question. The De Forest lot was not at any time claimed or held adversely, nor were the streets, so far as the record shows. No apparent distinction was made between the possession of the lot in question and that of the De Forest lot and the streets. If any distinction was made, it was a mental distinction, not communicated to Tenney. For nine years before receiving the quitclaim deed from Wight, Millett had been in possession of a large number of lots, owned by many different persons, holding in subordination to their title; and, without something to mark a change in the character of his possession, the possession itself could not be reasonably held to be notice that it was in fact hostile, and the possession must be hostile, or it cannot be adverse; and where its adverse character cannot be inferred from the fact of possession, notice of some kind that it is hostile must be given to the owner before the statute will begin to run against him: *De Frieze v. Quint*, 94 Cal. 662, 663, 28 Am. St. Rep. 151, 30 Pac. 1. In *Mauldin v. Cox*, 67 Cal. 387, 7 Pac. 804, the defendants went into possession under a lease, and afterward received a deed, and more than five years had elapsed after receipt of the deed before the action was commenced. At page 394, 67 Cal., and page 804, 7 Pac., the court said: "They [the defendants] had,

it is true, a secret conveyance of the property, but having been in possession under the lease, the plaintiff, having no notice of the deed, was not bound thereby. An entry to set the statute of limitations in motion must be sufficiently open and notorious to give the owner notice of the hostile claim and possession begun thereunder, and it must be hostile. . . . The owner will not be condemned to lose his land because he has failed to sue for its recovery, when he had no notice that it was held or claimed adversely.” •

The judgment offered in evidence by the defendants was properly excluded. The answer sufficiently shows that the judgment was given against Martin Millett and wife (plaintiffs in this action) in proceedings against them for a forcible or unlawful entry upon the possession of Lagomarsino. Such action does not involve title, and the judgment could have no effect upon this action.

Defendants offered to prove that in a conveyance executed by Michael Millett to defendant Cronan it was intended to include the lot in question, and that it was omitted by inadvertence or mistake. No issue of that kind was made in the pleadings. If the facts were as claimed, it would have been a proper case for a bill in equity to reform the deed.

Under the repeated rulings of this court the general findings made in this case were sufficient. It is not necessary, as appellants contend, for the plaintiff, in actions to quiet title, to allege the source of his title; and this rule of pleading applies where his title is acquired by adverse possession. The judgment and order appealed from should be reversed.

We concur: Searls, C.; Vancief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed.

LUTZ et al. v. ROTHSCHILD.

No. 15,516; November 27, 1894.

38 Pac. 360.

Attorney and Client—Recovery by Latter from Former.—Money received by an attorney from his client, under a misapprehension on the part of the latter as to the purposes for which it is being paid, and under circumstances which require the attorney in good conscience to refund the same, may be recovered back.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by August and Katie Lutz against Joseph Rothschild. There was a judgment for plaintiffs and defendant appeals. Affirmed.

Pierson & Mitchell for appellant; John Flournoy for respondents.

VAN FLEET, J.—This is an action in form for money had and received, to recover from defendant and appellant, an attorney at law, the sum of \$500, alleged to have been received by him from the plaintiffs and respondents as their attorney, and to and for their use, and which defendant refused to repay after demand. The answer was a denial of the allegations of the complaint, except as to nonpayment. The case was tried by a jury. Verdict and judgment were for plaintiffs for the sum demanded, and from the judgment and an order denying his motion for a new trial defendant appeals.

The only question involved in the appeal is as to the sufficiency of the evidence to justify the verdict. It is objected by respondents that there is no sufficient specification of insufficiency to enable the court to look into the evidence, but we find it unnecessary to determine that objection, since we have seen fit, under the circumstances, to examine the evidence in the record, notwithstanding the objection, and entertain no doubt of its sufficiency. Without stating the facts in detail, the evidence for plaintiffs tended to show that de-

defendant had received the money in dispute under a misapprehension on the part of plaintiffs as to the purposes for which it was being paid, and under circumstances which, if true, required the defendant in law and good conscience to refund it; while that of defendant went to establish that the money was voluntarily paid to him as a part of an entire fee for legal services performed, upon a distinct and perfect understanding of the parties. The jury found for plaintiffs upon evidence not only substantially conflicting, but which, it seems to us, fully sustains their verdict; and, of course, this finding cannot be disturbed.

It is urged by appellant that an action will not lie to recover money paid voluntarily and without compulsion where the party receiving the money is not guilty of fraud, and where both parties are equally cognizant of the facts upon which their rights depend. Conceding this to be true, the existence of the very facts upon which this principle is predicated were involved in the finding of the jury, which, as we have seen, was against appellant's contention. Judgment and order affirmed.

We concur: Garoutte, J.; Harrison, J.

PEOPLE v. MORASCO.

No. 21,165; December 3, 1894.

38 Pac. 423.

Homicide—Appeal.—An Appeal from a Judgment in a capital case will not be affirmed merely because no counsel has appeared to support the appeal by brief or oral argument.

APPEAL from Superior Court, Solano County; A. J. Buckles, Judge.

Rico Morasco was convicted of murder, and appeals. Affirmed.

A. J. Dobbins, Oscar Coughlan and J. A. Spinetti for appellant; Attorney General Hart for the people.

PER CURIAM.—The defendant in this case was convicted of murder in the first degree and sentenced to death. His appeal is from the judgment and from an order denying his motion for a new trial. We are furnished with an affidavit of the county clerk of the county in which the case was tried, which shows that a copy of the record was served on “the attorney of record” of the defendant on the twentieth day of August, 1894, and we are asked upon this affidavit to affirm the judgment and order appealed from, upon the ground that no brief has been filed in behalf of the defendant, and no counsel has appeared to suggest any error in the proceedings. The affidavit, however, is insufficient. The gentleman upon whom the record was served is not the attorney who acted as counsel for the defendant at the time of his arraignment and plea or during the trial, and his name is not signed to the notice of appeal. And, besides, we should not feel justified, in a capital case, in affirming the judgment without an examination of the record, merely because no counsel has appeared in support of the appeal by brief or oral argument. In view of the gravity of the case, we have directed further notice to be given to the attorneys who signed the notice of appeal, and, they having failed to respond, we have examined the record, in which we discover no error. The judgment and order of the superior court are therefore affirmed and the cause remanded, with directions to the superior court to take the proceedings necessary for the execution of its judgment.

BOARD OF EDUCATION OF CITY AND COUNTY OF
SAN FRANCISCO v. BLAKE et al.

No. 15,641; December 3, 1894.

38 Pac. 536.

Garnishment.—A Board of Education is not Subject to garnishment.¹

Mechanics' Liens—Notices.—Under Code of Civil Procedure, section 1184, providing, in regard to mechanics' liens, that the owner shall retain a certain percentage of the contract price for thirty-five days after the completion of the work, and that the materialmen, etc., may at any time serve notice on the owner of their claim for material furnished or labor performed, whereupon the owner shall retain sufficient of the money due or to become due the contractor to satisfy such claims, the notices may be served after the expiration of the thirty-five days, provided there are funds due the contractor still in the hands of the owner.²

Mechanics' Liens.—A County Deposited Money Due a Contractor in court, and two creditors of the contractor, one only of whom had a lien on the fund, together with the contractor, were ordered to interplead for the same. The contractor failed to set up any claim to the fund. Held, that the balance of the fund left after satisfying the creditor's lien should be paid to the other creditor to satisfy a judgment held by him against the contractor, instead of to the contractor.

APPEAL from Superior Court, City and County of San Francisco; James E. Murphy, Judge.

Action by the board of education of the city and county of San Francisco against John Blake and others to compel defendants to interplead and litigate their claim to a certain fund deposited in court. From a judgment for defendant J.

¹ Cited with approval in *Buchanan v. A. B. Spencer Lumber Co.* (Tex. Civ. App.), 134 S. W. 294, the court there going on to say that one to whom a debt exempt from garnishment is due can waive the exemption, but unless he does so his debtor cannot.

² Cited and approved in *First Nat. Bank v. Perris Irr. Dist.*, 107 Cal. 61, 40 Pac. 47, a case in which the contractor had assigned his claim before completion of the work, so that the controversy was really between the plaintiff and the assignee, who had intervened.

D. De Gear, defendants, the Kennedy & Shaw Lumber Company and others appeal. Modified.

William H. Jordan for appellants; Bert F. Miller for respondent.

HAYNES, C.—Defendant Blake erected an addition to a school building under a contract with the plaintiff, and completed the same September 14, 1892, at which date there remained unpaid \$829.45 of the contract price, which, by the terms of the contract, was not payable until thirty-five days after the completion of the work, as required by the statute, a sum insufficient to pay all the subcontractors and materialmen in full. Nine days after completion appellants commenced an action at law against Blake, the contractor, and served process of garnishment upon the board of education. Afterward De Gear and other claimants (who afterward assigned to him) served upon the board notices of their several claims, as provided by section 1184 of the Code of Civil Procedure, some of these notices being served before the expiration of the thirty-five days and others after such expiration. After these notices were all served, respondent De Gear also commenced an action against the contractor, and garnished the board of education, and both appellants and respondent obtained their several judgments against the contractor. The board of education thereupon commenced this action, paid said sum remaining in its hands into court, and obtained an order requiring the several defendants to interplead, and litigate their respective claims thereto. The defendants (except the contractor, who made no claim) interpleaded, and the cause was submitted upon facts agreed, and findings were filed and judgment entered awarding De Gear \$601.26, the amount of his claim, including the assigned claims, and \$6.50 costs, but making no disposition of the remainder of the fund. From this judgment appellants have appealed upon the judgment-roll.

In addition to the foregoing, the court specially found that appellants did not at any time serve upon the board of education any notice in writing of their claim, other than said notice of garnishment. So far as appellants are concerned, they proceeded against Blake as general creditors without any

reference to the fact that their claims were for materials furnished for the building erected for the plaintiff; and the question is, therefore, whether a general creditor, under the circumstances of this case, can, by an ordinary action at law against the contractor, and garnishment served upon the board of education, acquire any right to the funds in its hands to the exclusion of respondent, or any right to share in the fund to the prejudice of respondent. In the recent case of *Skelly v. School Dist.*, 103 Cal. 652, 37 Pac. 643, it was held that a school district is not subject to garnishment. That case, therefore, disposes of any claim appellants could make upon the fund so far as it is based upon the garnishment. The effect of the service of notices of their claims by respondent and his assignors is also settled by *Bates v. Santa Barbara Co.*, 90 Cal. 543, 27 Pac. 438. It was there held that a written notice of his claim, served by the mechanic or materialman upon the county under section 1184 of the Code of Civil Procedure, made it the duty of the county to retain sufficient funds to answer such claim; that the county thereupon became liable as upon garnishment or assignment; that it is a form of equitable subrogation regulated by statute; that the right of the parties giving the notice does not depend upon their right to a lien; and that "the right to control and direct the funds remaining in the hands of the owner is as distinct and independent as the right to file and enforce a lien." The statute required that this fund should be held by the board for thirty-five days after the completion of the work for the benefit of those who performed labor or furnished materials to the contractor, and who should serve the notice provided by section 1184 of the Code of Civil Procedure. A payment within that time, either to the contractor or under a garnishee process to a creditor of the contractor, could not diminish this fund. The board was during such period a statutory trustee of the fund for the benefit of the mechanic or materialman who should comply with the requirements of law, and for that reason also not subject to garnishment; and not being, then, subject to garnishment, no right to the fund was acquired by appellants as against those who by pursuing the statute acquired or perfected their right thereto. Appellants claim, however, that as against those claims of which notice was served after the expiration of the

thirty-five days they should be preferred; that the right of subcontractors and materialmen to serve notice of their claims expired when the last payment became due. It is true the board might have safely paid to the contractor at the expiration of the thirty-five days any money in its hands not required to pay claims of which notice had theretofore been served; but we think such notices may properly be served so long as the fund remains in the hands of the owner of the building, and that, if it were otherwise, appellants, having failed to acquire a right to the fund under the provisions of the code relating to mechanics' liens, cannot complain.

As to appellants' contention that they should have been awarded the remainder of the fund (said to amount to \$221.69), we think it should be sustained; not, however, upon the ground that the right to it was acquired by the garnishment, but because the board voluntarily paid the money into court, and required appellants to interplead concerning it. They already had their judgments against Blake, who was a party to the suit, and who made no objection to such application of the fund, and he was the only party who could object. The money must be paid either to Blake or the appellants, and we think Blake's failure to contest the right of appellants justifies a judgment in favor of the latter for the remainder of the fund. The judgment appealed from should therefore be modified so as to award the remainder of the fund in the hands of the court to appellants, but without costs, and as modified, that the judgment be affirmed, appellants to pay the costs of this appeal.

We concur: Belcher, C.; Vancielief, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment appealed from is modified so as to direct the payment of any balance that may remain of the funds in the hands of the court to appellants according to their several rights, but without costs; and, as modified, that the judgment be affirmed, at the cost of appellants.

BYRNE v. LUNING CO.

No. 15,628; December 3, 1894.

38 Pac. 454.

Street Assessment.—In an Action to Enforce an Assessment for street improvements, a complaint which, after alleging that the work was to be done according to specifications to be provided by the city, alleges general performance of the requirements, without specially setting out the specifications, is not subject to general demurrer.¹

Street Improvement.—Where a Bond Given for the Faithful Performance of a contract for public work recites that it is of "even date with the contract," the fact that it is dated one day earlier is not sufficient to prove, in an action to enjoin an assessment levied therefor, that the bond was in fact executed a day earlier than the contract.

Street Improvement.—The Fact That Such a Bond Provides that the superintendent of streets shall not be liable for any delinquency on his part does not vitiate the entire bond, though such provision be against public policy.²

APPEAL from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Thomas Byrne against the Luning Company to enforce a street assessment. From a judgment for plaintiff and from an order denying defendant's motion for a new trial defendant appeals. **Affirmed.**

J. P. Langhorne for appellant; J. C. Bates for respondent.

VANCLIEF, C.—Action to enforce a street assessment upon a lot of land in the city of San Francisco for the sum

¹ Cited and followed in *California Improvement Co. v. Reynolds*, 123 Cal. 91, 55 Pac. 803, where it was said that it is no more necessary to set out at length, in the complaint, the specifications for the work than so to set out the contract, the latter including the specifications. The right to receive an assessment upon due performance follows on its being averred that the plaintiff entered into this contract with the superintendent of streets.

² Cited in *Rauer v. Lowe*, 107 Cal. 235, 40 Pac. 339, where this rule was applied to a like guaranty contained in a contract for the construction of a sewer.

of \$181.45, in which judgment passed for plaintiff and defendant's motion for new trial was denied. Defendant appeals from the judgment, and also from the order denying its motion for a new trial.

1. Counsel for appellant contends that the complaint does not state a cause of action, because the specifications for the work furnished by the city engineer and made part of the contract were not set out in *haec verba* in the complaint. The complaint, however, does not purport to state any part of the contract in *haec verba*, but only the substance of it, according to its legal effect. The work to be done was described in the resolution of intention passed by the board of supervisors, and in the complaint, as follows: "That a sixteenth-inch stone-pipe sewer, with manhole and cover, be constructed in Jones street, from Vallejo to Green street." And it is alleged in the complaint that the specifications for this work were furnished at the proper time by the city engineer, and that they were attached to and made a part of the contract; that, by the contract, plaintiff agreed "that he would do and perform all the aforementioned work under the direction and to the satisfaction of the said superintendent of streets, in a good and workmanlike manner, and with the materials required by said specifications, which were also to be to the satisfaction of said superintendent of streets, and were to be furnished by the said party of the first part therein [plaintiff] according to the said contract and specifications." It is then alleged "that plaintiff duly performed all the terms and conditions of said contract therein contained to be performed on the part of said plaintiff, in every respect, within the time fixed in said contract, and according to the terms of said contract and specifications, under the direction and to the satisfaction of said superintendent, and with the materials required by him, and called for by said specifications; and the said work was duly approved and accepted by said superintendent." The complaint is in the usual verbose form which seems to have been generally adopted by the profession, specifically detailing all proceedings of the board of supervisors and other municipal officers relating to the street work in question; but the foregoing extracts contain all that relates to the specifications attached to the contract, and all that is necessary to illustrate the alleged ground of demurrer.

I think the complaint states the substance of a contract, and the performance thereof on the part of plaintiff, the legal effect of which is to entitle plaintiff to the relief demanded. This is sufficient to shield it against attack by the general demurrer, however vulnerable it may be to a special demurrer. Whether a copy of the contract upon which an action is based is or is not set forth in the complaint, the defendant may always demand and obtain an inspection of the original by pursuing the course prescribed by section 1000 of the Code of Civil Procedure; and if, upon such inspection, it appear that the complaint misrepresents the contract, or has omitted a substantial part of it, to the prejudice of the defendant, such misrepresentation or omission is matter of defense, but is not available as a ground of general demurrer, because it does not appear on the face of the complaint. And in this case the defendant, to maintain the issues on his part, obtained and introduced in evidence the original contract, with the specifications thereto attached; and it appears by the statement on motion for new trial that they were substantially as alleged in the complaint, and in due form, omitting nothing required by law. The case of *Libbey v. Elsworth*, 97 Cal. 316, 32 Pac. 228, cited by appellant, is not in point. A general demurrer to the complaint was sustained in that case on the grounds that the complaint did not show that the contract to do the work was entered into within fifteen days after the first posting of the notice of its award, and did not show that the superintendent of streets fixed the time for commencement of the work within fifteen days from the date of the contract, nor fix a time for the completion of the work. But it is alleged in this case that notice of the award of the contract was posted March 30, 1892, and that the contract was entered into April 12, 1892; and it is also alleged that the superintendent of streets fixed the time in said contract for the commencement of said work at fourteen days from the date of the contract, and the time for the completion thereof at ninety days from said date.

2. It is urged that the finding by the court that, at the time of entering into the contract, the plaintiff executed a bond for the faithful performance of the contract is not justified by the evidence. The original bond was introduced by defendant, and is admitted to be sufficient and in due form, with

the following exception: It bears the date April 11, 1892, whereas the contract bears the date April 12, 1892; and it is contended that the bond is void, because it appears to have been executed the day before the execution of the contract. Conceding, for the sake of argument, this extremely doubtful proposition, yet there is no evidence, except the written dates, tending to prove that the bond was delivered before the contract was executed. The true date of the execution of bond was the time of its delivery. It recites that it is of "even date with the contract." If this recital is true, it follows that there was a mistake of one day in the date of either the bond or the contract, and that such mistake is immaterial. At all events, the recital in the bond neutralizes the tendency of the written dates to prove that the execution of the bond was not contemporaneous with that of the contract; and, in this state of the evidence furnished by the bond and contract, the court was justified in finding that it did not overcome the prima facie case for plaintiff made by the warrant, assessment, diagram, etc.: Street Work Act, March 18, 1885, sec. 12, as amended (Stats. 1889, p. 168). This view obviates any necessity for deciding what effect a defective or even a void bond would have upon the contract.

3. In addition to the statutory and lawful requisites, the contract contains a superfluous provision, to the effect that neither the superintendent of streets nor his bondsmen shall "be liable or holden . . . for any delinquency on his own part." It is contended that this provision is against public policy, and therefore is not only void, but that it vitiates the whole contract. The provision is probably void, for the reason that the superintendent of streets had no authority to require or to make it; but it is easily separable from all other provisions of the contract, and therefore does not vitiate any one of them. The contract contains all the provisions required by law, and the finding of the court (not excepted to) is that plaintiff fully performed it on his part. It seems inconceivable, therefore, that the defendant, not being a party to the contract, could have been injured by the superfluous

clause, whether it be valid or void. I think the judgment and order should be affirmed.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

GRAHAM v. FRANKE.

No. 15,483; December 3, 1894.

38 Pac. 455.

Parties—Action on Contract.—Under Code of Civil Procedure, section 369, the party in whose name a written contract is made, though partly for the benefit of another, may sue thereon without joining the latter.

Evidence.—Error in Admitting Evidence is not ground for reversal, unless it was prejudicial.

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by A. L. Graham against R. Franke. There was a judgment for plaintiff and defendant appeals. Affirmed.

Sawyer & Ayer for appellant; G. S. Langan and W. R. Davis, for respondent.

BELCHER, C.—This is an appeal by the defendant from a judgment entered against him, and from an order denying his motion for a new trial. Two points only are made for a reversal. They are, (1) that the court erred in admitting certain evidence over the objections of defendant; and (2) that the court erred in denying defendant's motion for a nonsuit at the conclusion of plaintiff's evidence.

The complaint contains two counts. The first is based upon a written contract executed by the parties, and dated April

26, 1890, whereby the plaintiff agreed to sell and deliver to the defendant certain vegetable products, and defendant agreed to purchase and pay for the same certain stipulated prices. The second count is for goods, wares and merchandise sold and delivered. In each count it is alleged that defendant had not made full payment, and judgment is asked for the amount still due and unpaid. The evidence objected to by the defendant at the trial, and the admission of which is assigned as error, was to the effect that on April 4, 1890, the plaintiff and one Worthington became partners in the business of raising vegetables, and that this partnership continued up to the time of the trial; and the objection was that the evidence was immaterial and irrelevant to any issue raised by the pleadings. Conceding that this objection was well taken, still it is evident that the defendant was in no way prejudiced by the ruling. The evidence did not, to any extent, tend to fix, establish or enlarge the liability of defendant.

At the close of plaintiff's evidence, and after he had rested his case, defendant moved for a nonsuit upon the ground "that the evidence shows that the plaintiff, A. L. Graham, is not the real party interested, and that this suit should not and cannot be maintained by him alone; that the evidence shows that the transaction, the matter of the suit, is a partnership debt." The motion was denied, and we see no error in the ruling. The plaintiff's contract with the defendant was in writing, and under section 369 of the Code of Civil Procedure, he was authorized to sue upon it without joining Worthington, even if it was partly made for the benefit of the latter. The judgment and order appealed from should be affirmed.

We concur: Temple, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

VERMONT MARBLE CO. v. BLACK.

No. 15,591; December 7, 1894.

38 Pac. 512.

Judgment by Default.—While a Motion to Open a Default is addressed largely to the discretion of the court, all doubts should be resolved in favor of the application; and, where the circumstances lead the court to hesitate as to the merits of the application, an order denying such a motion will be reversed on appeal.¹

APPEAL from Superior Court, City and County of San Francisco; W. H. Levy, Judge.

Action by Vermont Marble Company against William Black. Judgment by default was rendered for plaintiff. After defendant's death, Annie Black, his administratrix, moved to open the default, and from an order denying her motion she appeals. Reversed.

Geo. C. Sargent for appellant; F. Wm. Reade for respondent.

PER CURIAM.—The respondent commenced this action against William Black in the superior court of the city and county of San Francisco on May 6, 1893, and on the same day summons was issued and personally served upon him in said city. No appearance by or on behalf of Black was made, and on May 31st a judgment by default was entered against him. On June 5, 1893, he died, and thereafter the appellant, Annie Black, the surviving wife of deceased, was duly appointed administratrix of his estate. On July 14th, upon suggestion of the death of Black, appellant, as such administratrix, was, by an order of the court, substituted as defendant in his place; and thereafter, on the twenty-second day of the same month, she served notice upon the respondent that she would on a day named move the court to vacate and set aside the said judgment by default, upon the ground that it was taken against said deceased through his excusable neglect.

¹ Cited in Vermont Marble Co. v. Black, 123 Cal. 22, 55 Pac. 599, as part of the history of the case, the latter being a second appeal.

At the hearing of the motion, appellant produced and read several affidavits, including an affidavit of merits, and presented a verified answer. The respondent also read several counter-affidavits. The motion was submitted upon the judgment-roll and the affidavits read by the respective parties, and denied by the court, and from that order this appeal is prosecuted.

It is settled law in this state that applications of this kind are addressed largely to the legal discretion of the trial court, and that the exercise of that discretion ought to tend in a reasonable degree, at least, to bring about a judgment on the merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application: *Watson v. Railroad Co.*, 41 Cal. 17; *Pearson v. Fishing Co.*, 99 Cal. 425, 34 Pac. 76. The affidavits read by appellant, if true, clearly establish the fact that the original defendant, William Black, from the time summons was served upon him till he died, was diseased in mind and body, and unable to attend rationally to any business. It is true that many of the facts stated in those affidavits are controverted by the counter-affidavits; but, after carefully reading all the affidavits, we are satisfied that the circumstances were such as to lead any court to hesitate, and, this being so, we think the doubt should have been resolved in favor of the application. As the order must be reversed, it is not necessary to consider the question as to whether the court erred in sustaining the objection of respondent to the affidavit of Dr. C. N. Ellinwood, the physician who attended upon said Black during his illness. The order is reversed and the cause remanded, with directions to the court below to set aside the judgment and allow appellant to file her answer to the complaint.

ON MOTION FOR REHEARING.

January 4, 1895.

PER CURIAM.—Rehearing denied. We are asked, in case of denial of a rehearing, at least to modify our judgment so as to direct the imposition of terms upon the open-

ing of the default. This, however, is a matter for the superior court, and there is nothing in our decision to prevent the imposition of such reasonable terms as may seem proper.

WELLS v. LAW et al.

No. 15,535; December 10, 1894.

38 Pac. 523.

Pleading—Amendment.—The Action of the Court in Allowing plaintiff to amend by inserting matters not set out in the notice of amendment served on defendants is not reversible error, where defendants were not injured thereby.

Master and Servant—Action for Breach of Contract—Amendments.—In an action for breach of a written contract of employment, plaintiff may amend the complaint to show that her discharge before the time agreed on therein had caused a loss of certain profits, which, by a collateral oral agreement with defendant, she was entitled to receive from each customer, such loss being in the nature of consequential damages.

APPEAL from Superior Court, Alameda County; F. W. Henshaw, Judge.

Action by Alice Wells against Hartland Law and Herbert E. Law for breach of contract. Judgment for plaintiff and defendants appeal. Affirmed.

John Flourney for appellants; Gibson & Wood for respondent.

PER CURIAM.—Appeal from the judgment and an order denying a new trial. This action was brought to recover damages for the alleged breach of a written contract, which is set out at length in the complaint. Plaintiff alleges: That the defendants were engaged in business at San Francisco under the name of the Viavi Company, the business consisting in the manufacture and sale of a nostrum or remedy known as “Viavi” and other preparations, and furnishing

treatment by administering such preparations and by giving baths. November 17, 1891, defendants employed plaintiff and one Louise Keach in their said business, for the term of one year, on terms stated in the agreement. Plaintiff entered upon the performance of her contract, and, with the said Keach, was appointed by defendants as their agent in Alameda county. That, besides the consideration expressed in the agreement, the employees were to have the privilege of collecting for their own use from patients the sum of three dollars for each bath given in the treatment. That, with the consent of defendants, Mrs. Keach assigned to plaintiff her interest in the contract and business. That on the 29th of July, 1892, defendants took from plaintiff her business, and refused thereafter to furnish to her the remedies, or to permit her to conduct the business. That she thereby lost profits which she would have made under the contract, and the incidental profits from giving the baths. She recovered a verdict, and the defendants appeal.

1. After the defendants had answered, plaintiff, upon notice, asked leave to amend her complaint. The court granted leave to amend in the respects named in the notice, and also in respects in which no mention was made in the notice. It does not appear that defendants were injured by this order. Even on the trial, the amendments might have been on just terms. As no injustice was done to the defendants, we do not think they have any cause to complain.

2. The amendment complained of consisted in adding to the original complaint the allegation of the compensation for baths. Nothing is said in regard to this in the written contract. It is contended that this is adding to the written contract. Whether, by parol, an additional consideration can be established, under the circumstances, it is not necessary now to decide. It is not necessary to regard it in that light. It sets up an incidental advantage or profit which she was able to realize by reason of the contract, and which she lost by its breach on the part of defendants. It is in the nature of consequential damages. There was a very substantial conflict in the evidence upon all the issues in the case. Indeed, except as to the matter of damages, the preponderance seems very plainly in favor of the verdict. As to damages, no certain determination was possible. Plaintiff introduced evi-

dence tending to show that her profits were regularly and rapidly increasing. What she would have realized is to some extent a matter of conjecture, but the case is one in which she was entitled to an estimate of probable profits.

There was no issue in the case in regard to the removal of the office. The circumstances attending the removal were probative facts, bearing upon the issue as to whether defendants had discharged plaintiff from their employ. Upon that issue the preponderance of the evidence was decidedly with the plaintiff.

Appellant attributes to the trial judge certain peculiar ideas in regard to the power and duty of a superior judge in granting new trials. It is said that the judge was of the opinion that he should not set aside the verdict of the jury, even when it was clear to his mind that the verdict was against the weight of evidence; that he therefore refused a new trial because he thought he had no jurisdiction. This court has frequently decided against the alleged views of the learned judge, and we find no evidence in the transcript of such fact, and it is disputed by respondent. We must presume he did his duty. The judgment and order are affirmed.

SHAIN v. DU JARDIN.

No. 15,582; December 10, 1894.

38 Pac. 529.

Sale—Action for Price—Evidence.—In an Action by the Assignee of R. & Co. for the price of goods sold by such firm to defendant, a witness stated that he was manager for R. & Co.; that he knew and had interviews and correspondence with defendant; that such firm sold him goods; that he was a customer of the firm before the witness became manager, and, without consulting the books, could not tell the extent of his purchases; that the balance due June, 1892, was \$547; that he and defendant agreed on a balance of \$497.30, which defendant agreed to pay in monthly payments; and that he afterward paid \$57. Plaintiff proved an assignment to him by F. under a power of attorney from R. & Co. to F., executed by Y., who was

shown to be the sole partner of such firm. Held, that the evidence supported a judgment for \$440.30 for plaintiff.

Pleading—Denial on Information and Belief.—An answer denying the allegations of the complaint “as this defendant is informed and believes” does not constitute a sufficient denial thereof.¹

Partnership.—One Person, or an Association of persons, may do business under a firm name entirely distinct from the name or names of the person or persons composing the firm.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Joseph E. Shain against L. Du Jardin to recover for goods sold and delivered to defendant by Rice & Co., plaintiff's assignors. From a judgment for plaintiff and from an order denying a motion for a new trial defendant appeals. Affirmed.

F. Wm. Reade for appellant; Jos. E. Shain in pro. per.

SEARLS, C.—This is an action to recover \$440.30 for goods, wares and merchandise sold and delivered by Rice & Co., assignors of plaintiff, to the defendant. The cause was tried by the court, without a jury, and written findings filed, upon which judgment was entered in favor of plaintiff. The appeal is from the judgment and from an order denying defendant's motion for a new trial. The sole point made by appellant is that his motion for a nonsuit should have been granted. The motion was based upon the ground that the proofs failed to establish the sale of goods, wares and merchandise by Rice & Co. to defendant, or that there was evidence of the sale, delivery or value of any goods. A single witness was called for plaintiff, who testified, in substance, that he was manager in San Francisco for Rice & Co., liquor dealers of Covington, Kentucky; that he knew defendant, had interviews and correspondence with him. He said Rice & Co. sold defendant goods. He had been a customer of that firm before witness became manager, and, without consult-

¹ Cited in a note in Ann. Cas. 1912C, 150, on the effect of denial on information and belief of matter necessarily within the knowledge of the defendant.

Cited in the note in 133 Am. St. Rep. 124, on when are denials on information and belief permissible.

ing the books, could not tell the extent of defendant's purchases. The witness then stated that the balance due June, 1892, was \$547; that defendant called at the office; they agreed upon the balance due as \$497.30, and defendant agreed to make monthly payments until all was paid. He made one payment of \$57, and nothing further. Plaintiff then proved an assignment of the claim of Rice & Co. to plaintiff, under a power of attorney from that firm to J. C. Fyfe, executed by John C. Yost, who was shown to be the sole partner of the firm of Rice & Co. Defendant offered no testimony. This uncontradicted testimony was sufficient to uphold the finding. It may well be doubted if, under the pleadings, any testimony was necessary as to the sale and delivery of the goods. The complaint was in the usual form, for goods, wares and merchandise sold and delivered by Rice & Co. to defendant at his request, at an agreed price, amounting to \$140.30, which defendant promised to pay, etc. The complaint is verified. The only attempt at an answer is as follows: "Now comes the defendant above named, and, for his answer to the complaint filed herein, alleges and sets forth that, as this defendant is informed and believes, he denies that the firm of Rice & Co. delivered goods, wares or merchandise to this defendant amounting to the sum of four hundred and forty 30-100 dollars, or in any amount." To say that as one is informed and believes he denies a thing is not to deny it positively or upon information and belief, or a denial for want of information or belief.

The contention that Rice & Co. was a fictitious name, and for that reason they could not maintain an action, needs no extended comment. A single individual or an association of individuals may do business under a firm name entirely distinct from the name or names of the person or persons composing such firm. In the absence of fraud, and as between himself and those with whom he deals, a person may do business and execute contracts under any name he chooses to assume: *Bell v. Publishing Co.*, 42 N. Y. Super. Ct. 567; *Ex parte Snook*, 2 Hilt. (N. Y.) 566; *People v. Leong Quong*, 60 Cal. 107. If the defendant purchased goods from the assignor of the plaintiff, who was doing business under the name of Rice & Co., he cannot, in the absence of fraud, evade

payment by showing that Rice & Co. was not the true name of the party from whom he purchased.

The judgment and order appealed from should be affirmed.

We concur: Temple, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McVEY v. BEAM.

No. 15,509; December 11, 1894.

38 Pac. 515.

Appeal—Objection not Raised Below.—Error in the admission of evidence will not be considered on appeal, where no exception is taken to the ruling admitting it.

APPEAL from Superior Court, Del Norte County; James E. Murphy, Judge.

Action by Asa N. McVey against Lewis Beam to recover the price of personal property sold and delivered by plaintiff to defendant. From a judgment for plaintiff and from an order denying a motion for a new trial defendant appeals. Affirmed.

R. W. Miller for appellant; L. F. Cooper for respondent.

VANCLIEF, C.—It is alleged in the complaint that plaintiff sold and delivered to defendant a certain lot of personal property for the agreed price of \$600, viz., two horses, two buggies, one stage, one dead ax wagon, a lot of hay (estimated at fifteen to twenty tons), two sets of double harness, robes, and a lot of oats; and that defendant promised to pay therefor said sum of \$600 on or before December 2, 1892, but had failed to pay said sum, or any part thereof, except the sum of \$20, whereupon plaintiff prays judgment for \$580. The complaint was filed December 17, 1892. The answer denies

the alleged delivery of all the property described in the complaint, but admits the delivery of the greater part thereof; denies that any price was fixed or agreed upon, or that defendant agreed to pay more than the reasonable value of the property delivered, and alleges that the reasonable value thereof did not exceed \$314; also sets up counterclaims exceeding the alleged value of the property delivered by \$27.50, and prays judgment against the plaintiff for this excess. The jury by which the case was tried returned a verdict in favor of plaintiff for \$580, upon which judgment was rendered. The defendant appeals from the judgment, and also from an order denying his motion for a new trial.

Counsel for appellant has not very clearly specified, either in his bill of exceptions or in his brief, the points he relies upon for a reversal; but I understand him to claim that the evidence is insufficient to justify the verdict, in one or two particulars, and that the court erred in admitting evidence of a novation of the debt in suit. The evidence is more or less conflicting on several issues, but on each of them it is sufficient to justify the verdict. Indeed, appellant's specifications under this head in the bill of exceptions claim little more than that there was a preponderance of evidence in favor of defendant, the two principal specifications being as follows: "There is not a preponderance of evidence in favor of the plaintiff upon any issue made by the pleadings. . . . There is a preponderance of evidence in support of, and affirming, the counterclaim of the defendant." All other specifications are of what the evidence shows, what it "fails to show," and what "the uncontradicted evidence shows." But I find all the alleged uncontradicted evidence to have been contradicted.

As to the alleged error of admitting evidence of a novation, there was no exception taken to the ruling of the court admitting it. Besides, it related to averments in the answer, and did not tend to prove a novation, but the contrary. I think the judgment and order should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

GARBE v. WILKS.

No. 15,726; December 11, 1894.

38 Pac. 499.

Trial.—A Finding “That the Plaintiff Did not on the eighteenth day of November, 1892, lend the said defendant the sum of eight hundred dollars in U. S. gold coin” is insufficient on an issue framed by a complaint which states that “within two years last past, and on or about” that day, plaintiff loaned defendant “eight hundred dollars in gold coin of the United States.”

APPEAL from Superior Court, City and County of San Francisco; Walter H. Levy, Judge.

Action by Henry Garbe against Nellie Wilks to recover a certain sum of money loaned to defendant by plaintiff. There was judgment for defendant, and from that, and an order denying him a new trial, plaintiff appeals. **Reversed.**

H. D. Talcott for appellant; Alex. Campbell, Jr., for respondent.

TEMPLE, C.—This action was brought to recover money alleged to have been loaned to the defendant. The defendant recovered judgment, and the plaintiff appeals from the judgment and from an order refusing a new trial.

One of the points made is that there is no adequate finding upon a material issue, and that without such finding the judgment cannot be sustained. The complaint states that “within two years last past, and on or about the 18th day of November, A. D 1892, the said plaintiff lent to the said defendant, at her request, the sum of eight hundred dollars in gold coin of the United States.” It further states that the money was loaned to enable defendant to purchase a lodging-house, and was so used, and that defendant agreed to pay the same in installments of \$50 per month, but has failed and neglected to do so, and, though requested, refuses to pay any part thereof. The only finding relating in any way to these allegations is in the following words and figures: “That the plaintiff did not on the 18th day of November, 1892, lend the said defendant the sum of eight hundred dollars in U. S. gold coin.” With a strong desire to avoid the reversal of a

judgment for the insufficiency of a finding, when it appears probable that the court intended by the finding to cover that issue, we yet think this finding cannot be sustained. Under the present practice, unless findings are waived, so far as the issues are concerned, which must be determined in order to justify the judgment, no findings are presumed. It is true, if the judgment is thus supported, the fact that there are other issues upon which there are no findings will not always necessitate a reversal. As to the fact of a loan here, the evidence was highly conflicting. There was even some evidence which appellant thinks corroborated his evidence, to the extent that he loaned defendant \$780. He might have done so, and yet the finding be exactly true. The language of the finding is not as broad as the language of the complaint. It is not averred that plaintiff loaned the money to defendant on the eighteenth day of November, but within two years last past, and on or about November 18th. Potentially, this is an allegation as to every day of the past two years, and as to every imaginable sum included in \$800. The finding seems carefully worded so as not to negative the loaning on any other day, or of any other sum. Of course, we know the judge did not intend a finding so evasive, but we have no right to suppose he intended more than he has said. No construction can be given to the language which will make it cover the whole issue; and we cannot, with due regard to the statute or to proper practice, sanction such looseness in preparing findings—premising that we can suppose the judge really intended to negative the entire allegation.

Plaintiff is not injured by the fact that the counterclaim is entitled "Cross-complaint and Counterclaim." It is evidently a counterclaim only, and plaintiff did in fact file an answer to it. Had it been doubtful whether it was a cross-complaint or a counterclaim, and, because of the fact that defendant called it a "counterclaim," plaintiff had filed no answer to it, then, if a default had been claimed, the considerations expressed in *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747, would have been in point. But here no injury has resulted. The judgment and order should be reversed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

BLYTH et al. v. TORRE et al.

No. 15,526; December 14, 1894.

38 Pac. 639.

Mechanics' Liens.—A Memorandum of a Contract for a building costing over \$1,000, filed in the recorder's office, in which the only description of the property and of the work to be done is that "the building is to be a frame building," is fatally defective.

Mechanics' Liens.—A Materialman is not Estopped from enforcing his lien because he is on the contractor's bond to the owner to secure him from loss on account of the default or negligence of the contractor.¹

APPEAL from Superior Court, City and County of San Francisco; J. C. Hebbard, Judge.

Consolidated action by Henry Blyth and others against Luigi Torre and others to foreclose mechanics' liens. From the judgment, plaintiff Blyth appeals. Reversed.

E. H. Wakeman for appellant; Tilden & Tilden and McGee & Cavagnaro for respondents.

GAROUTTE, J.—This action is brought to foreclose a number of mechanics' liens, and Henry Blyth appeals from the judgment. A written contract was entered into between Luigi Torre and Antonio Raffo, the owners of certain land, and a contractor, Gardiner, for the erection of a building thereon. The contract was for an amount in excess of \$1,000, and was not filed in the recorder's office, but a memorandum

¹ Cited in Sanders v. Keller, 18 Idaho, 590, 111 Pac. 351, where the court say: "It is a well-established rule of law that the surety for a contractor on a building contract cannot maintain his action for the foreclosure of a lien for materials furnished where the full contract price has been paid to the contractor."

Cited in Barrett-Hicks Co. v. Glas, 9 Cal. App. 496, 99 Pac. 864, where the court called attention to the fact that in the former case there had been no answer to the complaint setting up the giving of the bond by the plaintiff, whereas the giving of the indemnity bond had been set up by the answer, in the latter case, thus marking a distinction between the two cases.

thereof was so filed. The contractor failed to pay the laborers, materialmen, etc., and this action was brought by various lien claimants. Blyth, appellant, as the assignee of Blyth and Trott, materialmen, is a party plaintiff. His claim for relief, as evidenced by his complaint, is based upon the idea that the memorandum of contract filed in the county recorder's office is void in failing to contain those matters required by the statute. It is alleged that it neither contains a statement of the general character of the work to be done nor does it describe the property to be affected. The defendants, by their answer, claim the sufficiency of the memorandum, and as an affirmative defense allege that plaintiff Blyth was a surety upon the contractor's bond in the sum of \$1,900, and by the terms of which bond he guaranteed that the contractor would faithfully perform the conditions of his contract, and that he would save and keep these defendants safe and harmless from all liens that might be filed on account of any claim against the contractor, not exceeding the sum of \$1,900. Defendants further allege that liens in large amounts had been filed against the building, and by reason of the conditions of the bond aforesaid plaintiff was estopped from filing, asserting, or enforcing any lien against the property. The trial court held the memorandum of contract sufficient in law, and also held that plaintiff was estopped from prosecuting this action for a foreclosure of his lien, upon the grounds relied upon by defendant. The action was a consolidated action, and other lien claimants recovered judgment, but their interests are not here involved. We think the memorandum of contract fatally defective in attempting to state the general character of the work to be done. As a compliance with this provision of the statute the memorandum says: "The building is to be a frame building." While the law requires no description in detail of the general character of the work to be done, still it requires more than is here found. This statement is too general. To say that the building is to be a stone building or a brick building or a frame building entirely fails in essentials to give that notice to the public which the law contemplates. By consulting the memorandum of contract it would be impossible to say whether the building is to be a diminutive cottage, or a large public caravansary, or whether the contract

price is at all in proportion to the character of the building to be erected. In *Willamette Steam Mills etc. Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 235, 29 Pac. 629, it was held that a memorandum of contract describing the building as "three stories high" is void; likewise a "two-story building, 51 by 25": *Butterworth v. Levy*, 104 Cal. 506, 38 Pac. 897. See, also, *Dunlop v. Kennedy*, 102 Cal. 443, 36 Pac. 765.

We think the lower court's position unsound as to the estoppel. The necessary facts to constitute an estoppel do not arise in this case. Plaintiff has a cause of action which he is entitled to litigate, and this bond, given to the owner to secure him from loss against the default or negligence of the contractor, in no way bars him from coming into court with his cause of action. The bond is simply to indemnify the owner against damage, and until his damage has been alleged and proven in some appropriate action it can avail him nothing. If he has not been damaged, he has no right of action upon the bond; and, if no right of action upon it, it is valueless to him, even for the purpose of an estoppel. The case appears to have been considered as though the presentation of the bond in open court at the trial ipso facto estopped plaintiff from taking any other step in the prosecution of his action, and this, too, regardless of the amount of the bond, as compared either to the amount of plaintiff's claim or the amount of defendants' damage. If defendants' damage is nothing, or trifling in amount, plaintiff should not be deprived of all remedy; or, if plaintiff's indemnifying bond is trifling in amount, as compared to his claim of lien, the doors of the courts should not be shut against him. In other words, the principle of estoppel is not involved, but it is rather a question of a cross-complaint or setoff. The defendants, in answer to plaintiff's action to foreclose his lien, may set out the bond, prove their damage, and establish plaintiff's liability thereon, and the rights of both parties be thus fully and equitably adjudged. Such was the course pursued in *Blyth v. Robinson* (Cal.), 37 Pac. 904, and such is undoubtedly the proper course. For the foregoing reasons the judgment is reversed and the cause remanded.

We concur: Harrison, J.; Van Fleet, J.

PATENT BRICK CO. v. WISSINGER.

No. 15,654; December 20, 1894.

38 Pac. 639.

Appeal.—Where the Evidence is Conflicting, the judgment will not be disturbed.

APPEAL from Superior Court, City and County of San Francisco.

Action by the Patent Brick Company against J. W. Wissinger. From a judgment in favor of plaintiff defendant appeals. Affirmed.

Cameron H. King for appellant; Roger Johnson and D. H. Whittemore for respondent.

McFARLAND, J.—Judgment went for plaintiff in the superior court and defendant appeals. Appellant contends for a reversal of the judgment and order denying a new trial upon two grounds: (1) That the evidence was insufficient to justify the finding that there was not an account stated between the parties; and (2) that it was insufficient to justify the finding that there was a balance of \$3,365.24 due from appellant. These contentions are very fully and well presented in the brief of counsel for appellant; and it is there very strongly argued that the case at bar does not come within the rule which obtains in cases where there is a substantial conflict of evidence. But, after an examination of the record, we are satisfied that there was such a substantial conflict as brings the case within said rule. A statement of the evidence here would serve no useful purpose. One asserted error of law in ruling out a certain question asked a witness is referred to in the brief, although apparently not much relied on. Considering the other evidence in the case, it was unimportant whether the question was allowed or not. Judgment and order appealed from are affirmed.

We concur: De Haven, J.; Fitzgerald, J.

STEEN v. HENDY et al.*

No. 15,644; December 24, 1894.

38 Pac. 718.

Reference—Claim Against Decedent.—Pending a Reference, Defendant Died, and his executor was substituted in his stead. On the hearing before the referee the executor objected to the taking of any testimony, because plaintiff had not filed his claim with him. Held, that the objection being made before there was any evidence as to whether the claim had been presented to the executor, it was premature, and the referee rightly proceeded with the hearing.

Appeal—Time for Taking.—Where No Motion for a New Trial is made, the question whether the judgment is supported by the evidence will not be considered on appeal unless the appeal is taken within sixty days after the rendition of the judgment on a bill of exceptions setting out the evidence.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by J. W. Faulkner against Joshua Hendy and the Joshua Hendy Machine Works, a corporation, for the dissolution of a partnership and for an accounting. Pending the action, the cause of action was assigned to E. T. Steen, who was substituted as plaintiff, and defendant Joshua Hendy died, whereupon his executors were substituted in his stead. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Boyd, Fifield & Hoburg for appellant corporation; W. H. H. Hart and Nowlin & Fassett for appellant executors; Wm. H. Jordan for respondent.

TEMPLE, C.—This appeal is from the judgment, with a bill of exceptions. The action was brought to obtain a dissolution of an alleged partnership, to have an account taken, and for other relief. It was commenced March 11, 1876. At the first trial plaintiff recovered judgment, and defendants appealed, and that appeal was disposed of here

*For subsequent opinion in bank, see 107 Cal. 49, 40 Pac. 21, 386.

October, 1889: 80 Cal. 636, 22 Pac. 401. The facts of the case appear in the opinion then rendered. It was found that the partnership—if the relations between the parties could be so called—had ended before the suit was brought, leaving in Hendy's hands property in which Steen had a contingent interest, and which Hendy continued to sell from time to time after this suit was begun. By stipulation, however, it was found that Hendy had in his hands something more than \$10,000, which belonged to Steen. The question left to be determined was what interest or what share of the profits of Hendy's business Steen was entitled to. After the remittitur was filed from this court, Steen amended his complaint, made for the first time the corporation a defendant, and claimed that Hendy had actually realized a large amount of money from the use of the trust funds which he, Steen, was entitled to recover. The corporation was created September 29, 1882, and it was made a party to this suit November 26, 1889. The supplemental and amended complaint, by which the corporation was brought in, charges, in effect, that Hendy owned all the stock of the corporation, and that it was organized to carry on Hendy's business, to hide plaintiff's property, and to defraud plaintiff. A money judgment was demanded against both defendants. Soon after, Hendy paid the amount found due, exclusive of interest, and the cause was referred to a referee to try, with directions to report findings and a judgment. While the trial was in progress—October 21, 1891—Hendy died. The record does not show when letters of administration were issued in the estate of Hendy, but it appears by order made August 10, 1892, that the death of Hendy was suggested by plaintiff, and it was ordered that the case be continued in the names of the executors; and the bill of exceptions recites that: "At the first session after his death and said substitution, to wit, on the nineteenth day of November, 1891, said defendants objected to further proceeding with the trial or the taking of any further testimony in the case upon the ground that the claim upon which the action is based has not been presented for allowance to the executors and executrix of Joshua Hendy, deceased; but the referee, notwithstanding such objection, proceeded with said trial and the taking of testimony in the case, to all of which the defendants duly excepted, and the said trial and taking

of testimony was then proceeded with by said referee, the trial was concluded, and the case argued and submitted." The bill goes on further to state that no claim upon which the action was based was ever presented to the executors or executrix for allowance, or to either of them. That "the defendants, and each of them, excepted, and now except, to the decision, upon the ground that it is against law in the following particulars: . . . (3) The decision is against law in giving judgment against defendants, to wit, the executors and executrix of the estate of Joshua Hendy, deceased, inasmuch as no claim was presented to them. (4) The decision is against law in deciding that the action is not barred by the statute of limitations as to the defendant corporation." The appeal is from the judgment, and was not taken within sixty days.

It is objected that these points are really that the decision—that is, the findings—is not justified by the evidence, and such objection cannot be made in this way. The objection was not that improper evidence was offered, or had been admitted, but that plaintiff would not be able to produce certain evidence which was essential to his case. If the pleadings had shown that no such evidence could be produced, or counsel had admitted upon the trial that the fact could not be proved, the court could then and there have ruled upon the question. But the bill of exceptions does not show that any such admission was made. It is true, the bill of exceptions, after reciting the objection, the ruling, and exception, proceeds to state that the court proceeded to hear the evidence and to render judgment, and that no claim on the part of plaintiff was ever presented to the executors or executrix. The bill of exceptions was made after judgment, and does not show that at the time of the exception the fact that the claim had not been presented was an established or admitted fact before the court. Defendants could not dictate the order of proof, and, so far as the bill of exceptions shows, the court might well have presumed that such evidence, if essential, would be yet produced by plaintiff. The real objection is that the evidence does not support the decision—that is, the finding. As no motion for a new trial was made, and the appeal was not taken within sixty days after the rendition of the judgment, this question cannot be now considered.

The objection that the court erred in not finding in favor of the defendant corporation upon the plea of the statute of limitations is in the same position. No evidence is contained in the bill of exceptions, and, if it were there, it could not now be considered. The court found that the demand was not barred by the statute of limitations. This finding is not attacked in any mode authorized by law, to wit, by a motion for a new trial, or on an appeal taken within sixty days, with a bill of exceptions setting out the evidence. We must presume, therefore, that there was sufficient evidence to sustain the finding.

The other point—that plaintiff cannot recover interest, because he elected to claim the profits actually made by the use of the trust funds—was determined on plaintiff's appeal from this judgment. The judgment now appealed from was then modified by increasing the amount of interest allowed. Respondents then had an opportunity to be heard, and were heard at least in their petition for a rehearing. The question cannot be again raised. I think the judgment should be affirmed.

We concur: Haynes, C.; Vanelief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

In re SMITH'S ESTATE.*

No. 15,754; December 26, 1894.

38 Pac. 950.

Appeal—Record.—Where, on Appeal, There is Neither a bill of exceptions nor a statement of the evidence, the findings of fact will be accepted as true.

Will—Community Property.—A Will of a Married Man, in terms disposing of all the community property, which states that it "is made with full knowledge of property rights of husband and wife, and with the knowledge and consent of my said wife," indicates

*For subsequent opinion in bank, see 108 Cal. 115, 40 Pac. 1037.

the intention of testator to dispose of all his property, including the interest of his wife.¹

Will—Community Property.—Where a Will Shows that testator meant to dispose of community property, the conveyance by testator's widow of a life estate devised by the will operates as an acceptance by her of the provisions thereof.

APPEAL from Superior Court, San Benito County; James F. Breen, Judge.

Accounting by Robert Cardiff as administrator with the will annexed of the estate of Robert Smith. From the decree made, the administrator and Mary Smith, widow of testator, appeal. Affirmed.

Briggs & Hudner for appellants; Montgomery & Jefferson for respondent.

VANCLIEF, C.—Robert Smith, who died April 31, 1892, disposed of all his property by his last will as follows: "I give and bequeath to my daughter, Mrs. Mary Cardiff, now of San Benito county, California, a life estate in my home ranch in San Benito county, California, the same being described as follows, to wit, being the southwest quarter of section 6, township 15 south, range 7 east, M. D. M.; also all live stock, farming utensils, household furniture, and in fact all personal property that may be on the said ranch, excepting money on hand, securities, and other evidences of money due me; to have and hold and use during her natural life as her own, and at her death to pass in fee to her sons, Robert Cardiff and Geo. H. Cardiff, and to their heirs in fee simple. But, in the event I survive my said daughter, Mary Cardiff, then, at my death, said property to pass directly to her said sons, Robert and George Cardiff. This bequest, however, is not to take effect during the lifetime of my wife, Mary Smith, who is now residing with me on the above-described property. In the event she survives me, she is to have full and free use and absolute control of said real property and personal herein referred to, and after her

¹ Cited in the note in 92 Am. St. Rep. 705, on when a widow is by a will required to elect between its benefits and her right to dower or in the community property.

death to pass as above provided. This is made with full knowledge of property rights of husband and wife, and with the knowledge and 'consent of my said wife.' " The will further bequeathed one dollar to each of four grandchildren of the testator, and the residue of testator's personal property, consisting of money and securities, as follows: To his son William R. Smith, four-tenths thereof; to his son John A. Smith, three-tenths thereof; and to his daughter Jessie Smith, three-tenths thereof. The will nominated said William R. and John A. joint executors thereof, and on May 2, 1892, they were duly appointed as such by the probate court. Both qualified and entered upon the performance of the duties of the trust, but both died before the settlement of their final account—John A., October 19, 1892, and William R., June 25, 1893, though the latter had filed an account which purported to be a final account, on June 1, 1893. On July 22, 1893, Robert Cardiff, son of Mary Cardiff, and grandson of the testator, was appointed administrator with the will annexed, who, on December 18, 1893, filed his final account, and his petition representing that the estate was in condition to be closed, and praying that his final account be allowed, and that the estate be distributed. While the matter of settling the final account of the administrator was pending, to wit, January 31, 1894, Mary Smith, widow of the testator, filed in the probate court her written claim and notice that all the property of which the testator died seised or possessed was community property, and that she claimed one-half thereof as not subject to testamentary disposition by her late husband. The widow of John A. Smith, as executrix of his estate and as heir of her husband, filed written objections to the final account of the administrator, and also objections to the claim of Mary Smith to one-half of the estate of the testator, alleging that Mary Smith had elected to take under the will, etc. The court, after settling the final account of the administrator, found that all the property of the testator was community property of husband and wife, but that the wife of the testator (Mary Smith) had elected to take under the will, and that she had so taken, and had sold, conveyed, and released to Robert Cardiff and George H. Cardiff, her grandsons, who were also reversionary devisees of all the estate devised and bequeathed to their mother (Mary Cardiff)

and to their grandmother (Mary Smith) during their lives; and thereupon the court decreed that the whole estate be distributed in strict accordance with the will. The administrator, Robert Cardiff, and Mary Smith, widow of the testator, appeal from the order settling the administrator's final account, and also from the decree of distribution.

The appeals come here on the judgment-roll, consisting of the final account as rendered by the administrator, the petition of the administrator for the allowance of his account and for distribution of the estate, the written objections to the account, the written notice of Mary Smith that she claimed one-half of the entire estate, the written findings of the court, the order of the court settling the administrator's final account, and the decree of distribution: *Estate of Isaacs*, 30 Cal. 106; *Estate of Page*, 57 Cal. 240; *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345, 639. There is no bill of exceptions, nor any statement of evidences, though it appears that the findings of fact are based upon evidence produced by the parties. Therefore the findings of fact, at least so far as they are self-consistent, must be accepted as true. The appellants contend that the court erred in distributing the property according to the will of Robert Smith to the prejudice of the right of appellant Mary Smith to one-half of all the property, real and personal, described in the will. In support of this point they claim that the language of the will does not sufficiently evince an intention of the testator to devise more than his own half of the community property to overcome the presumption to the contrary, as held in the cases of *In re Gilmore*, 81 Cal. 240, 22 Pac. 655, *In re Gwin's Estate*, 77 Cal. 313, 19 Pac. 527, and *Estate of Silvey*, 42 Cal. 210. But I think this is a mistake, and that the language of the will clearly indicates the intention of the testator to dispose of all the property therein described, including the interest of his wife. On the construction given it by appellants, no single provision of the will as expressed can be executed without disturbing and partly defeating all others. Besides, it is expressly stated that the will "is made with full knowledge of property rights of husband and wife, and with the knowledge and consent of my said wife." This indicates very clearly that he actually knew what he is presumed to have known, namely, the law governing the rights of husband and wife as to com-

munity property; and that he intended to dispose of her interest in the property in a way which would not be valid without her consent. And, conceding that this would not be competent evidence of her consent, it is nevertheless competent and satisfactory evidence of his intention specifically to dispose of each parcel of property described in the will.

It is contended, however, that the widow never elected to take, and never did take, under the will. But, as above shown, the findings of the court below are conclusive upon these points. As to her election, that court found the naked ultimate fact "that said Mary Smith, widow of said Robert Smith, has elected to take under said will"; and also the probative fact that after the death of her husband, and prior to January, 1894, she said to Robert Cardiff that "she wished the will to stand." As to the actual taking of the property under the will the court found: "That since the death of said Robert Smith said Mary Smith, his widow, conveyed all her interest in said property, mentioned in said will as vesting a life estate therein upon said widow, to Robert and George Cardiff. . . . She has remained in possession of said real property, and said personal property upon and about said real property, being the property described in the will as bequeathed to her a life estate, until the year 1893, when she conveyed all her interest therein as hereinbefore stated." It should be observed here that Mary Cardiff, to whom was devised the second life estate in the land and personal property thereon, died after the death of the testator, so that her life estate never vested; and therefore, the effect of the conveyance or release of the life estate of Mary Smith to Robert and George Cardiff, the reversioners in fee, was to invest them with the absolute title to all the land and personal property thereon under the will. But if the will is not valid as to the widow's half of that property, then her life estate and the reversion to Robert and George Cardiff were restricted to the testator's half of the land and personal property thereon. Another effect of restricting the will to the testator's half of the property would be to deprive William R., John A., and Jessie Smith of one-half of the specific legacies bequeathed to them. I think the findings of fact bring this case under the rule announced in the case of *Morrison v. Bowman*, 29 Cal. 347, affirmed in *Noe v. Splivalo*, 54 Cal. 207. In the

former of these cases Mr. Justice Curry, after reviewing the authorities, stated the rule as follows: "A testamentary provision in lieu of a devisee's or legatee's proprietary right, in order to render it such upon acceptance of it, must be declared in terms to be given in lieu of such right; or that intention must be deduced by clear and manifest implication from the will, founded upon the fact that the claim to such proprietary right would be inconsistent with the will, or so repugnant to its dispositions as to disturb and defeat them. . . . The intention of the testator must be kept in view as the pole star in the construction or interpretation of his will; and it is not to be presumed, in the absence of a manifest intent on his part, that he designed to make disposition of any property not his own. But when it does so appear, and the owner of such property accepts a legacy or devise under the will, which acceptance necessarily operates to give effect to the will as an entire disposition by the testator, such acceptance must, by the conditions on which it is founded, be held to be a confirmation of the dispositions of the will." None of these cases cited by appellant conflict with that of *Morrison v. Bowman*. I think the order settling the administrator's final account and the decree of distribution should be affirmed.

We concur: Searls, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order settling the administrator's final account and the decree of distribution are affirmed.

PEOPLE v. McSWEENEY.

No. 21,112; December 31, 1894.

38 Pac. 743.

Homicide—Character of Defendant.—Where the question as to what the witness in a murder case had heard against the defendant was not limited to a period prior to the homicide, it was properly ruled out.¹

¹ Cited in the note in 103 Am. St. Rep. 897, on evidence of good character for the purpose of creating a doubt of defendant's guilt.

Homicide—Character of Defendant.—Where a Witness in a Murder case on his direct examination did not testify that he knew the defendant's reputation at any time, and on cross-examination his testimony tended to show that his knowledge of such reputation prior to the homicide was insufficient to qualify him to testify regarding it, it was not error to refuse to allow him to further testify on the subject on his redirect examination.

APPEAL from Superior Court, San Bernardino County; Campbell, Judge.

U. B. McSweeney was convicted of murder in the first degree, and appeals from the judgment and order denying a new trial. Affirmed.

Byron Waters and A. B. Paris for appellant; Attorney General Hart for the people.

VANCLIEF, C.—The defendant was convicted of the crime of murder in the first degree, and sentenced to imprisonment for life in the state prison, and appeals from the judgment, and from an order denying his motion for a new trial.

The only question presented for decision is whether or not the trial court erred in sustaining the objections of the district attorney to certain questions asked John McFee, a witness for defendant, on his re-examination by defendant's attorney. The record does not show what questions were asked by defendant's attorney on the direct examination, but shows that the witness testified that he was acquainted with the defendant; that he had known defendant for the last four or five years at Holcomb Valley, in San Bernardino county, where the homicide occurred; and that defendant's "general reputation during the past four years, in the vicinity where he has resided, for peace and quietude, has been fair." Upon cross-examination as to his means of knowledge of defendant's character, he said he had not resided at Holcomb Valley prior to the homicide, but resided six or seven miles from there, and went up there only occasionally, and was "somewhat acquainted with the reputation of McSweeney in Holcomb Valley," but that he did not remember whether he had heard defendant's "reputation for peace and quietude discussed in Holcomb Valley at all prior to the shooting."

He further said: "I think I have talked about it—about some of his actions, and that sort of thing." The following re-examination of this witness by defendant's attorney shows the action of the court assigned as error: "Mr. Paris: Q. State whether or not you have heard of his being in any difficulties there, or of a turbulent nature. Have you ever heard anything against him as a man of peace and quiet? Mr. Oster: We object to the question as irrelevant, immaterial, and incompetent. The Court: Sustained. (Defendant then and there duly excepts.) Q. State whether or not you have ever heard, in the neighborhood where you and McSweeney resided for four years, anything against the general peace and quietude of this man McSweeney's character. Mr. Oster: We object to the question as incompetent. The Court: You can answer the question 'Yes' or 'No,' if you can—just whether or not you have heard it. A. Well, yes; I have heard about it somewhat. Q. Well, what have you heard? Mr. Oster: We object to the question on the ground that it is incompetent. The Court: Sustained. (To which ruling the defendant then and there duly excepts.) Q. Have you, in that neighborhood, for the last four years, in which you and McSweeney have resided, have you ever heard anything against the peace and quiet of that man's character? Mr. Oster: We object to the question as incompetent, on the ground that no proper foundation has been laid for it. The Court: Objection sustained. (To which ruling the defendant then and there duly excepts.)" Inasmuch as the witness was permitted to answer, and did answer affirmatively, the twice repeated question as to whether he had heard anything said against the character of the defendant, the defendant could not have been injured by the temporary rulings against that question, even if they were erroneous, which, however, is not conceded.

The only remaining question is whether it was error to exclude an answer to the question: "Well, what have you heard—that is, what have you heard said against the character of the defendant?" As the only answer called for by this question was what the witness had heard said against the character of the defendant, it is difficult to conceive how the defendant could have been benefited by the answer or injured by its exclusion, since the witness had already answered, in

effect, that he had heard somewhat against defendant's character. But, however this may be, the question was objectionable on the ground that it was not limited to a period prior to the homicide, especially in view of the testimony of the witness on the cross-examination, in which he said he did not remember having heard defendant's reputation discussed in the community (Holcomb Valley) where he resided, prior to the homicide: *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396. Furthermore, since the witness did not, on his direct examination, testify that he knew the general reputation of the defendant at any time, and his testimony on cross-examination strongly tended to show that his knowledge of such reputation in the community where defendant resided prior to the homicide was not sufficient to qualify him to testify in regard to it, the court may have properly sustained the objection to his proffered further testimony on this ground: *People v. Moan*, 65 Cal. 534, 4 Pac. 545; *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481. I think the record fails to show any error which could have been prejudicial to the defendant, and that the judgment and order should be affirmed.

We concur: Searls, C.; Haynes, C.

HARRISON, J.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

We concur: De Haven, J.; Van Fleet, J.

McFARLAND and GAROUTTE, JJ.—We concur in the judgment. We think that some of the questions asked the witness McFee which were ruled out should have been allowed, but think that, taking the examination of that witness as a whole, appellant was not prejudiced thereby.

HALL v. COLE et al.

No. 19,495; December 31, 1894.

38 Pac. 894.

Removal of Buildings—Suit for Recovery—Cross-complaint.—Under Code of Civil Procedure, section 442, providing that, when a defendant seeks affirmative relief relating to the transaction upon which the action is brought, he may file a cross-complaint, a cross-complaint in an action to recover buildings removed from plaintiff's land which alleged that plaintiff purchased the land and erected the buildings for defendants, agreeing to convey the premises to them when they could purchase the same; that defendants tendered him the purchase price therefor, but that he refused to give them a deed thereto, and which prayed judgment that plaintiff deed the property to defendants, was improperly stricken out.

Removal of Buildings.—In an Action to Recover Buildings Removed from plaintiff's land, wherein defendants admitted that plaintiff purchased the land and erected the buildings, but claimed to own the premises by reason of plaintiff's agreement to sell the same to them, and their tender to him of the purchase price, plaintiff testified that he agreed to sell the premises to defendants, and that they advanced him money to apply in purchasing the land and erecting the buildings, but that they withdrew all of the same soon after; that he let defendants go into possession of the premises without any further transaction; that thereafter defendants tendered him the purchase price of the land, only, and he told them merely that he could not give them a deed, but would have to see the man who then held the title to the property to secure a loan to plaintiff, held, that ownership of the buildings not appearing in defendants, a nonsuit was improperly granted.

APPEAL from Superior Court, San Diego County; W. L. Pierce, Judge.

Action by M. Hall against A. R. Cole and another for the possession of buildings. Judgment for defendants and plaintiff appeals. Reversed.

Wm. Humphrey for appellant; D. C. Collier, D. L. Murdock and F. W. Goodbody for respondents.

BELCHER, C.—The plaintiff brought this action to recover the possession or value of a dwelling-house and barn,

alleged to have been wrongfully moved by the defendant Isabell Cole from a lot of land described as "Lot 34 of La Mesa Colony," in the county of San Diego. The complaint sets up facts showing that the plaintiff purchased and paid for the said lot, and erected the house and barn thereon, and that, without his consent or knowledge, the defendant Isabell Cole moved the same to an adjoining lot owned by defendants, who were husband and wife. The answer denied that the plaintiff was the owner of the said house and barn, or either of them, or entitled to the possession thereof, and alleged that, at all times since the erection of said house and barn, the defendant Isabell Cole had been, and still was, the owner thereof. The answer then proceeded to state, in effect, that the plaintiff purchased the said lot for and on account of the defendant Isabell Cole, for the sum of \$900, less \$25 allowed him by the owner for making the sale, and that she advanced to him, in part payment therefor, the sum of \$550; "that within a few days thereafter the plaintiff stated to the defendants that he had purchased said land for the defendant Isabell Cole, and that there would be a few days' delay in preparing the title to her, but he advised them to take immediate possession of it, and to grub and plow and improve it, and stated to defendant Isabell Cole that he would immediately build for her a house on said land, which would be hers, and a home for her as long as she lived, and that she could pay for it when she got ready, and could have as much time in which to do so as she desired"; that the plaintiff built on the said lot the house mentioned in his complaint, for the defendant Isabell Cole, "and that after the completion thereof, at the request of plaintiff, the defendants moved into, took possession of, and occupied, said house, as their own, and not as the property of the plaintiff, and that said house and said barn were from the first commencement of the erection thereof, and ever since have been, the property of the defendant Isabell Cole, and that said house, at the time of its erection, set upon blocks on the surface of the ground on said lot 34"; that, at the time of making the payment of \$550, it was agreed between plaintiff and defendant Isabell Cole that he would, as soon as it could be done, cause a deed to be made to her for said premises, and that she should execute a mortgage for the balance of the purchase money

therefor, and that she thereafter repeatedly requested plaintiff to perform and carry out his agreement, but he failed to do so, giving various excuses therefor; that afterward, and before the commencement of this action, she tendered to plaintiff "the entire balance of said purchase money for said lot 34, and its appurtenant water rights, as agreed upon between them, with all accrued interest thereon, and demanded from plaintiff a deed therefor, whereupon the plaintiff refused to comply with said agreement and refused to make a deed to said defendant for said lot." The defendants also filed a cross-complaint, in which they set out the facts, and prayed for judgment against the plaintiff, that he make a good and sufficient deed to the defendant Isabell Cole, conveying to her the said lot, free and clear from all encumbrances. The cross-complaint was, on motion of plaintiff, stricken out, and the defendants excepted to the ruling. The case subsequently came on regularly for trial before a jury, and at the conclusion of the plaintiff's evidence the defendants moved for a judgment of nonsuit, "because the plaintiff's evidence does not contain anything tending to show that at the time this suit was commenced the plaintiff was entitled to the possession of the house and barn, for the recovery of the possession or value of which this action is brought, but it does appear from said evidence that at the time this suit was commenced the plaintiff was not entitled to the possession of said house and barn." The court granted the motion, and entered judgment that the plaintiff take nothing by his action, and that the defendants recover from him their costs. From this judgment the plaintiff appeals.

We think the court erred in striking out the defendants' cross-complaint, and also in granting their motion for nonsuit. The complaint and the cross-complaint related to alleged rights growing out of the same transaction; that is, the purchase of the lot and payment therefor, and the erection of the house and barn thereon. And the rule is that, whenever the defendant seeks affirmative relief relating to the transaction upon which the action is brought, he may, in addition to his answer, file a cross-complaint: Code Civ. Proc., sec. 442.

At the commencement of the trial, defendants admitted in open court that the plaintiff purchased the land, from which

the house and barn were moved, of one Hamilton, on December 12, 1890, and that Hamilton was then the owner thereof, and also that defendant Isabell Cole took and moved the house and barn in question from the said land to land owned by her, on February 27, 1892. The plaintiff, then, as a witness for himself, testified that he had Mr. Hamilton make the deed of the land to a Mr. Wilson to secure payment of \$400, money borrowed by him of Wilson, and that he paid Hamilton the whole of the purchase price for the land, which was \$900; that he built the house and barn on the land between the months of January and March, 1891, and paid for them himself, the house costing \$1,250, and the barn \$50; that the house and barn were taken away by Mrs. Cole without his consent or knowledge; and that on March 19, 1892, he paid Wilson the loan, for the payment of which the land was security, and Wilson then conveyed the land to him, and assigned to him all his interest in the house and barn. The deeds and assignment were offered and received in evidence. The witness further testified that he built the house to assist Mr. Cole, because he was a man of large family and small means; that at the time he bought the land he told Mr. Cole he would build the house, and sell the land and improvements to him for just what they had cost; "that he and Mr. Cole talked about it several times, and, before he bought the land, Mr. Cole, at his request, advanced him \$550 to apply in the purchase of the land and the building of the house," and that, within a few days after Mr. Cole advanced the \$550, he came to plaintiff's house, and "stated that he had no money or means to keep his family, and asked to draw against the \$550 from time to time, which he assented to, and Mr. Cole withdrew all of the money advanced, and more (about \$600 in all), within a few months thereafter"; that he let Mr. Cole into possession of the premises in April, 1891, without any further transaction between them." On cross-examination, the witness testified that Mr. Collier, the lawyer, made a tender to him for Mrs. Cole, and that he simply remarked he could not give a deed, but would have to see Mr. Wilson, and also that: "I was buying the land for Mr. Cole. I told Mr. Kretsinger that I was building the house for Mr. Cole, when I hired him. I first told Mr. Cole and his wife that I owned the property when I was building the house. . . .

The \$550 was paid to me on December 2, 1890. . . . I might have said to them, after buying the land, 'Well, I have got the land for you.' " On redirect examination the witness was asked, in reference to the tender made by Mr. Collier, "State what was tendered," and answered: "Mr. Collier met me in the California National Bank, and said he wanted to make a tender to me, and stated the amount. It was between five and six hundred dollars. I forget the exact amount. I think he said, '\$550 and interest due you from Mrs. Cole on lot 34, La Mesa.' He had some money in his hand. I did not see how much. This was a few days before the house was moved by defendant Mrs. Cole." The above was, in substance, all the evidence on which the motion for nonsuit was made and granted; and, in our opinion, entirely fails to show that either of the defendants was the owner or entitled to the possession of the said house and barn at the time of the commencement of the action, or of the trial. It appears that the lot was purchased and the buildings constructed by the plaintiff to accommodate and assist the defendants, but they were to be paid for by defendants before they would become the owners thereof. There is no pretense that any part of the cost of the buildings had been paid, or offered to be paid; and when Mrs. Cole moved them from the lot, without the knowledge or consent of plaintiff, she did so wrongfully, and the plaintiff at once became entitled to their possession or value. Whether Mrs. Cole had become entitled to a deed of the lot is a question not now involved in this case, and upon it we express no opinion. We advise that the judgment be reversed, and the cause remanded for a new trial, with directions to the court below to permit the defendants to file anew their cross-complaint, if so advised.

We concur: Searls, C.; Vanelief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded for trial, with directions to the court below to permit the defendants to file anew their cross-complaint, if so advised.

ROBERTS v. BALL et al.

No. 15,622; December 31, 1894.

38 Pac. 949.

Trial.—Failure to Find on Certain Issues Raised by the pleadings, and making findings outside the issues, is harmless error, where the findings made on material issues warrant the judgment whatever the findings on the other issues.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by W. G. Roberts against A. E. Ball, administrator, and another. Judgment for defendants. Plaintiff appeals. Affirmed.

Maxwell, Dorsey & Soto for appellant; H. I. Kowalsky for respondents.

PER CURIAM.—This appeal by the plaintiff is from the final judgment upon the naked judgment-roll, which contains no bill of exceptions; and the only error assigned is that the court did not find on all the issues of fact raised by the pleadings. After a careful examination of the voluminous pleadings and findings, we think the court substantially found upon every material issue, except upon that raised by defendants' plea of the statute of limitations. But, even if the court had expressly found in favor of the plaintiff upon this issue and all others upon which he contends there should have been findings, still the facts actually found would have been controlling, and amply sufficient to uphold the judgment. In other words, the facts expressly found support the judgment, and are entirely consistent with all averments in the complaint not negated by an express finding, and also consistent with a finding in favor of plaintiff upon any issue tendered by the answer upon which there is no express finding. If, as contended by counsel, some of the findings are outside of the issues, this is immaterial, since the judgment finds ample support by findings upon the material issues: *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098; *Winslow v. Gohransen*,

88 Cal. 450, 26 Pac. 504; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4. Upon the authority of these cases, the judgment is affirmed.

MORROW et al. v. NORTON et al.

No. 15,530; December 31, 1894.

38 Pac. 953.

Assumpsit.—The Fact That the Complaint in an Action by an Assignee of an account for goods sold against copartners, after alleging the incurring of the liability by defendants, also alleges that one of the defendants promised to pay the same, does not render it demurrable, as the latter allegation may be treated as surplusage.

Statute of Frauds—Pleading.—In an Action on a Contract, required by the statute of frauds to be in writing, the complaint need not allege that it was in writing.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by George S. Morrow and others against W. H. Norton and another. There was a judgment for plaintiffs, and defendant Norton appeals. Affirmed.

John A. Wall for appellant; Warren Olney for respondents.

VAN FLEET, J.—We deem this appeal frivolous. Judgment was for the plaintiffs in the court below, and the defendant Norton appeals from the judgment, and from an order denying his motion for a new trial.

1. The only point made against the judgment is that the demurrer to the complaint should have been sustained for want of facts sufficient to constitute a cause of action. There is nothing in the point. The complaint counts on two several promissory notes made by the firm of McBride & Pease to plaintiffs, and an account for merchandise sold and delivered by a third party to defendants and assigned to

plaintiffs. These several obligations are set up in separate counts, each complete in itself, setting forth that at the time of incurring them defendants were carrying on and conducting a livery-stable business as partners under the name of McBride & Pease, and that the notes were made and the account incurred by defendants as such partners, and that they have not been paid. It is then further alleged that since the making of the notes and the account defendant Norton has promised to pay them. It is urged that the original obligations of McBride & Pease and the separate promise of Norton cannot both be counted on in the same action. But the point does not arise under the demurrer. The complaint states a cause of action against the defendants jointly, and the allegation of the independent promise of Norton might be disregarded as surplusage, and yet leave the complaint sufficient. It is further urged that the separate promise of Norton was one which, under the law, must be in writing, and it is not so averred. Assuming this to be true, the failure to so allege does not make the complaint demurrable. Where a contract is alleged which, under the law, is required to be in writing, and the complaint is silent as to the manner in which it was made, the implication is that it was made in the manner required: *Barnard v. Lloyd*, 85 Cal. 131, 24 Pac. 658.

2. The second and only other point made is that the evidence does not sustain the finding that the defendants were partners. We have examined the evidence, and it is sufficient to say that, while somewhat conflicting, we think it amply sufficient to warrant the finding in question, and the judgment cannot, therefore, be disturbed. We think the character of the record in this case should not pass unnoticed. The statement on motion for new trial covers about one hundred and fifty pages of the transcript. It is plainly nothing more nor less than a copy of the shorthand reporter's notes of the trial, with a head and tail attached. It is replete with all the unnecessary repetition and irrelevant side-bar matter which so readily and almost unavoidably finds its way into the record at the trial in the lower court under our present system of verbatim stenographic reporting. Nothing in the way of unnecessary matter seems to have been eliminated, or even permitted to escape. There is not a pretense, from beginning to end, of stating anything in narrative form. Everything

is by question and answer, just as it came from the reporter, apparently. This is inexcusable. In order to pass intelligently upon the objection made to the findings, we have been compelled to wade through this whole mass of one hundred and fifty pages of matter, good, bad and indifferent, while all that is relevant and material to appellant's case, as presented here, could have been fully, and much more advantageously for him as well as the court, stated in not to exceed twenty pages. The proper method of preparing statements and bills of exceptions is so clearly indicated in the statute, and has so often been adverted to and pointed out by this court, that it need not be restated here. It is enough to say that this statement not only wholly fails to comply with the statute, but is one of a character that has been most frequently criticised and condemned. It should be the aim of counsel in preparing a record to facilitate, rather than impede, the ready and intelligent examination of the case. Certainly it is in the interest of the litigant that this should be so. The law at best is not an exact science, and its proper administration is sufficiently beset by difficulties without additional burdens cast by carelessly prepared records. The judge of the court below would have been fully justified in refusing to settle this statement in its present form; in fact, it was his duty, without objection, to require the party to put the statement in the form required by the statute before certification. The judgment and order are affirmed, with \$100 damages.

We concur: Garoutte, J.; Harrison, J.

BURRIS *v.* KENNEDY et al.*

No. 15,634; January 3, 1895.

38 Pac. 971.

Probate Sale—Collateral Attack.—A probate sale of realty, when collaterally attacked by the grantee of a distributee under the final decree, who raised no objection to the validity of the sale, will not be set aside for mere irregularities.

*For subsequent opinion in bank, see 108 Cal. 331, 41 Pac. 458.

Probate Sale—Sufficiency of Petition—Presumption on Collateral Attack.—Where an order of probate sale of realty recites that at the hearing thereon the court “heard, understood, and fully considered the law and the premises,” it will be assumed that it heard evidence as to the value of the property sold, and the sale will not, on collateral attack, be set aside because of the absence in the petition for sale of an allegation of the value of said property.

Probate Sale—Sufficiency of Petition—Presumption on Collateral Attack.—Where a petition in the probate court for the sale of realty recited that the petitioner “duly made and returned to said court . . . a true inventory and appraisement of all the estate” of deceased, as “will more fully appear by reference to the papers on file in the clerk’s office,” it will be assumed, on a collateral attack on the sale, that the realty was inventoried and appraised as required by statute, and its actual cash value there stated, so as to supply an omission in the petition to state the value of the property.

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Jesse Burris against Catherine Kennedy and others to quiet title. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

Hutchinson & Campbell and Donald Y. Campbell for appellants; Sharp & Bolton for respondent.

GAROUTTE, J.—This is an action to quiet title, and grows out of the claim of respondent that a probate sale of real estate, made in the estate of James Kennedy, deceased, was void. The respondent is a grantee of Annie Church, an heir of Kennedy, and it is conceded occupies no more advantageous position in this litigation than would Annie herself, if the party plaintiff. Judgment went for the respondent, and this appeal is from that judgment and from the order denying a motion for a new trial. Respondent at the trial made numerous objections to the validity of the sale, but many of them are directed to mere irregularities, and are highly technical—entirely too technical to be considered when a collateral attack is made upon the judgment and decree confirming the sale. It was well said in *Burris v. Adams*, 96 Cal. 664, 31 Pac. 565: “In a doubtful case a court will not lean toward the attacking party, when he is, as in the case at bar, a mere volunteer, and when his grantor was a distrib-

utee in the final decree based upon the validity of the sale, and made no objection to it, and received without question the benefit of the money paid into the estate by the purchaser at the sale." And we reiterate that such a grantee must come before the court with something more substantial than irregularities in the proceeding, before probate sales of realty will be set aside in actions of the present character. Courts now hold much more liberal views upon these matters than are indicated in the early judicial history of the state; and, since the enactment by the legislature of section 1537 of the Code of Civil Procedure as it now reads—which legislation in part was placed upon the statute books by reason of the prior rigorous holding of the court against the validity of probate sales—the cases have been very exceptional in which by collateral attack sales have been annulled and set aside; and the advance upon liberal lines which the court has made in this class of litigation is largely attributable to the broader jurisdiction with which the court is now possessed under the present constitution, as compared to that which rested upon it in earlier times. The petition for sale of real estate involved in the present action asked that six certain tracts of land be sold. Five of these tracts were fully described, and their valuation and condition stated. The remaining tract, and the one in which we are now interested, is described in said petition as follows: "A piece of property bounded westerly by Bihler property, east by property line, southerly by the Central Pacific Railroad, northerly by East Fourteenth street, being an undivided one-fourth interest, valued at one thousand dollars per acre." No complaint is now made as to the sufficiency of the description, but it is claimed that, as to this particular tract of land, the petition is jurisdictionally defective, in this: that no valuation is placed upon it, and thus a positive demand of the statute omitted. The acreage of the tract not being stated, it is claimed that the valuation of \$1,000 per acre gives the court no light as to its value, for it is impossible from the face of the description to even estimate the acreage. The trial court held that the objection to the admission of the petition in evidence upon this ground was well taken, that the petition was fatally defective, and the sale thereunder void for this reason. We see no other matter disclosed by the record pertaining to the validity of

the probate proceedings leading up to the sale, the confirmation thereof, and the delivery of the deed, of sufficient importance to demand extended consideration. This is rather a small matter upon which to set aside a sale of real estate in an action to quiet title. The description of the land is sufficient, its condition is shown, and a valuation placed upon it by the acre. In addition, the order of sale recites that at the hearing of the application the court "heard, understood, and fully considered the law and the premises"; and, upon such a recital in the decree, we must assume that the court heard evidence upon the question of value. Under the foregoing state of facts, we are not now prepared to say that the sale was invalid by reason of the absence in the petition of an allegation of the total value of the tract.

But there are other reasons for sustaining the sale more weighty than these. The petition recites "that your petitioner duly made and returned to said court . . . a true inventory and appraisement of all the estate of said deceased, . . . all of which will more fully appear by reference to the papers on file in the clerk's office . . . in the matter of said estate, which is hereby made." By reason of this reference, the inventory and the appraisement are to be considered a part of the petition, and omissions of material statements from the petition may be supplied by statements from the inventory and appraisement. It was said in *Stuart v. Allen*, 16 Cal. 501, 76 Am. Dec. 551: "Nor is it essential that there should be in the petition itself, and without reference to any other paper or thing, a statement of these facts. The main fact required is the averment of the insufficiency of personal assets, and mere formal defects in the mode of statement would not affect the jurisdiction. The reference to the inventory makes, for all purposes of the reference, the inventory a part of the petition." This principle is also recognized in *Estate of Boland*, 55 Cal. 310. The inventory and appraisement in the estate of Kennedy, deceased, is not in the record, but we must assume in this character of action that the particular tract of land involved was not only inventoried, but that it was appraised, as required by the statute, and its actual cash value there stated, and, if the value of the land sought to be sold is such a material and jurisdictional fact that its recital in the petition is absolutely

necessary, then a reference to the appraisement upon file among the records of the estate for such information satisfies the statute. The fact that this reference is general for all purposes, rather than special for one purpose, in no way weakens its effect; and upon principle, and also upon the reasoning of *Stuart v. Allen*, supra, we think the defective statement of facts found in the petition proper is cured by the reference. In the case of *Dennis v. Winter*, 63 Cal. 16, the validity of a probate sale was upheld, although the record disclosed that the petition for sale placed no valuation whatever upon the land sought to be sold, and the order of sale found as a fact the appraised value alone. The court held that, in view of the last clause of section 1537, Code of Civil Procedure, the petition, aided by the order, was sufficient to give the court jurisdiction of the proceeding. For the foregoing reasons, the judgment and order are reversed and the cause remanded.

We concur: Harrison, J.; Van Fleet, J.

BURLING et al. v. NEWLANDS et al.*

No. 14,592; January 5, 1895.

39 Pac. 49.

Trust—Charging Trust Estate.—For the convenience of certain lenders and borrowers of money, who did their business through a bank, a firm of stock brokers were in the habit of giving their promissory notes, and securing themselves by bank stock and other collaterals delivered to them by the president of the bank. Subsequently the bank failed, and the president conveyed all his property to a trustee, to be applied by him to "such purposes and uses as he may deem best for our joint and several interests." By fraudulent representations that the stock and collateral paid by the stock brokers were worthless, the trustee induced them to pay to him \$200,000, in consideration of his promise to pay all their outstanding notes, which promise he performed. Held, that the fraudulent representations by the trustee gave the stock brokers only a personal right of action against him, and that they could not charge the trust estate

*For subsequent opinion in bank, see 112 Cal. 476, 44 Pac. 810.

in his hands for such sum, since they were not creditors of the bank president, who created the trust.

Limitation of Actions.—A Cause of Action for Fraud is not Taken Out of the operation of the statute of limitations by the Code of Civil Procedure, section 338, subdivision 4, which provides that the statute does not begin to run until discovery of the fraud, where it appears that the slightest examination of the public records would have put plaintiffs in possession of the facts, and that they acquired their information on which the action was based by inquiry of their friends and acquaintances—a course open to them before the statute had run.

Laches—Fraud.—Equity will not Entertain a Cause of Action Seeking relief from an alleged fraud, where complainants could have informed themselves of the facts by the exercise of reasonable diligence, but delayed bringing suit for over ten years, and until after the death of all the participants in the transactions.

APPEAL from Superior Court, San Francisco County.

Action by Leonide H. Burling and others against Frank G. Newlands and Frederick W. Sharon to compel defendants to account as successors of William Sharon, trustee of the property of William C. Ralston, deceased. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Joseph M. Nougues for appellants; Wm. F. Herrin, J. M. Allen and H. L. Gear for respondents.

McFARLAND, J.—This action was brought to obtain an accounting of the alleged trust estate and property of William C. Ralston, deceased, which is averred to have been conveyed by him in his lifetime to William Sharon, also now deceased, and by said Sharon to the defendants herein, and for a decree that there be paid to plaintiffs, out of said property, the sum of \$200,000 and interest. The plaintiffs are the executrix and executor of William Burling, deceased, and the assignee in insolvency of James W. Burling, an insolvent; and the defendants are Frank G. Newlands and Frederick W. Sharon, to whom the said William Sharon during his lifetime conveyed all his property in trust. Defendants demurred to the complaint on general and on several special grounds. Their demurrer was sustained by the court

below, and judgment was rendered for defendants; and plaintiffs appeal from the judgment.

The amended complaint occupies four hundred and twenty-six pages of the printed transcript; and we will not undertake to give here even a synopsis of such a lengthy document. We will state only such facts as will present a distinct view of the main epochs in the long historical narrative. William C. Ralston was cashier of the Bank of California from 1868 to 1873, and its president from 1873 to the time of his death, which occurred August 27, 1875. From 1869 to 1872 he employed William Burling, a stock broker, to negotiate loans; Burling giving his individual notes for the loans, and Ralston furnishing shares of the stock of the bank, and other collaterals, as securities for the money borrowed. In 1872, William Burling formed a partnership with James W. Burling under the firm name of Burling & Bro.; and thereafter, until Ralston's death, loans were negotiated in like manner through the agency of said firm. On August 26, 1875, the said bank failed; and on the next day Ralston died by drowning. At that time there were outstanding notes of said William Burling for loans negotiated as aforesaid in the amount of about \$155,000; and there were notes of Burling & Bro. given for loans so negotiated in the amount of about \$1,613,000. Before his death, and on the day of his death, Ralston executed a conveyance of all his property to said William Sharon, "in trust to collect and receive the rents, issues, incomes, and profits thereof, and every part thereof, and to sell and dispose of the same on such terms and prices as he deems best, and to apply the same and the proceeds thereof, and of all the property hereby conveyed, to such purposes and uses as the said William Sharon may, in his judgment, deem best for our joint and several interests." On December 24, 1875, William Burling and Burling & Bro. made a contract with said William Sharon, under which they paid to Sharon \$200,000, and assigned to him all claims against the estate of said Ralston upon said outstanding notes; and said Sharon, by said contract, undertook to assume all indebtedness upon said notes, and relieve said Burling and Burling & Bro. from all liability arising upon the same, which said undertaking by said Sharon he fully performed. The said Burlings and the said Sharon had been negotiating

about said contract nearly four months before its consummation. It is averred that the Burlings were induced to pay said \$200,000 to said William Sharon by representations of the latter to them that the shares of bank stock held by them as security for their said notes were illegally over-issued stock, and worthless; that the other collaterals held by them were owned by strangers to these transactions, and had been surreptitiously taken from the bank; that Ralston's estate was insolvent; that they (the Burlings) would be holden for the whole amount of said outstanding notes without recourse to any security; that D. O. Mills and all the other officers and employees of said bank confirmed the truth of said representations; and that they, having no sufficient information on the subject, relied on said representations of Sharon, and were thus led to enter into said contract and pay said \$200,000. And it is further averred that all these representations were false, and were by said Sharon "willfully, designedly, and fraudulently made for the purpose of cheating and defrauding them, said Burlings, as aforesaid, out of said sum of \$200,000." A certain proportionate part of the \$200,000 was paid by said William Burling, and the balance by the said Burling & Bro. William Burling died on July 15, 1877; and the partnership was wound up and settled in January, 1879. In August, 1877, the plaintiffs herein, Leonide H. Burling and Benjamin Burling, were appointed administratrix and administrator of said William Burling, deceased; and they pray that there be paid to them the proportionate part of said \$200,000 and interest, which they allege to be due to his estate. In June, 1882, the said James W. Burling, formerly the other member of the said firm of Burling & Bro., became an insolvent debtor; and in June, 1886, the plaintiff Benjamin Burling was appointed his assignee in insolvency; and he prays that there be paid to him, as such assignee, the proportionate part of said \$200,000 and interest which he avers to be due the estate of said insolvent. The said William Sharon, on November 4, 1885, by deed of trust, conveyed in fee all his property, of every kind, to the defendants Newlands and Frederick W. Sharon; and on November 15, 1885, the said William Sharon died. The purpose of this action is to compel the defendants, as trustees under said deed to them from said William Sharon,

to account for all real and personal property, the title to which "the said Sharon received under and by virtue of said deed of trust made on the twenty-seventh day of August, A. D. 1875, by said W. C. Ralston to him, said William Sharon," and to have said property, "of the estate of said W. C. Ralston," applied to the payment of said \$200,000 and interest. The action was commenced on the twenty-fifth day of October, 1886, which was about eleven months after the death of said William Sharon, and eleven years after the transaction upon which the suit is founded.

Respondents present various reasons why the judgment of the court below should be sustained, and appellants attack it from various standpoints; but, under the views which we take of the case, it is not necessary to discuss all the propositions argued by the respective counsel. In our opinion, if, upon the facts alleged, the Burlings had any cause of action at all, their remedy was a personal action against William Sharon to recover damages for deceit in procuring their payment to him of the \$200,000 in the manner as alleged, or upon an assumpsit to refund the money, implied from a rescission of the contract under which it was paid, for fraud by Sharon in obtaining it. But this is not such an action. The nature of the action is stated in the first sentence of the brief of appellants, as follows: "This action is brought to obtain an accounting of the trust estate and property of the late William C. Ralston, which was conveyed to the late William Sharon in trust, and if, upon such accounting, it be ascertained that the estate of said Ralston was solvent, that there be repaid to the plaintiffs the sum of two hundred thousand (\$200,000) dollars and interest thereon, being moneys paid on account of liabilities incurred for said William C. Ralston." No claim is made against the personal representatives of William Sharon, deceased, or against his estate.

The theory of the complaint is that the conveyance from Ralston to William Sharon was a deed of trust for the benefit of Ralston's creditors; that the Burlings were beneficiaries under such deed of trust; and that, as such beneficiaries, they can charge the present respondents F. W. Sharon and Newlands for the repayment of said \$200,000 and interest, to the extent of the value of any property which they may have

belonging to said alleged Ralston trust estate. Now, in the first place, it is doubtful if said conveyance created a trust estate of which Ralston's creditors were the beneficiaries. It is not so expressed on the face of the instrument. But, assuming that there was such a trust estate, it does not appear that at the time of its creation the Burlings were creditors of Ralston. It appears that for the convenience of certain lenders and borrowers of money who did their business mainly through the Bank of California, and who were frequently unknown to the Burlings, they (the Burlings) were in the habit of giving their promissory notes, and securing themselves by taking bank stock and other collaterals. Why the Burlings did this, or what, if any, advantage accrued to them therefrom, does not appear. During the period of these transactions Ralston was either the cashier or president of the bank, and appears to have been its principal business manager. Whether or not his request to the Burlings to make these notes upon the securities furnished them was made in his individual capacity, or as an officer of the bank, does not clearly appear. It certainly does not appear from the facts stated that he entered into any personal obligation to the Burlings on account of said notes, or made any individual promise with respect to them. It is expressly alleged in the complaint that at the times of these transactions "said Wm. C. Ralston did not give . . . to the said Wm. Burling, or to the said firm of Burling & Brother, any evidence of indebtedness from him, said W. C. Ralston." Facts are not averred showing that the Burlings were sureties for Ralston; neither is it averred that the said collateral securities were not sufficient to protect said Burlings. No charge of misconduct is made against Ralston; but, on the contrary, it is averred that all statements of William Sharon about the unlawful acts of Ralston, his insolvency, and the worthlessness of said securities, were false. Moreover, the Burlings assigned to William Sharon all claims arising upon said notes against the estate of Ralston. Therefore, whatever construction may be given to the said deed from Ralston to William Sharon, the appellants in this action have no present claim as beneficiaries thereunder. And it is very clear that they are not such beneficiaries with respect to the very thing sued for in this action, viz., the \$200,000, which it is averred

William Sharon fraudulently induced the Burlings to pay him four months after the death of Ralston and the execution of said deed. It is averred that Sharon used the said \$200,000 in paying off certain debts of Ralston, but we do not see that any importance attaches to that averment. It could make no difference whether he so used that particular money, or any other money which he may have had. From every point of view the case presents the same aspect; namely, that if any wrong was done the Burlings, under the facts alleged, it was a wrong done by William Sharon personally, and that the only remedy was a personal action against the said Sharon.

Moreover, we think that the action is barred by the statute of limitations, and is stale from laches. Of course, the statutory period has run two or three times unless the case is saved by the clause (subdivision 4) of section 338 of the Code of Civil Procedure, which provides that in an action based upon alleged fraud the statute does not commence to run until the discovery of the facts constituting the fraud. This action is founded upon the contract between the Burlings and William Sharon, made on December 24, 1875, which was an executed contract; and the statute commenced to run on that day, except so far as its running was delayed by a want of knowledge of the fraud by which said contract is alleged to have been procured. But "the means of knowledge are the same thing, in effect, as knowledge itself" (*Wood v. Carpenter*, 101 U. S. 143, 25 L. Ed. 807); and one who makes a charge of fraud for the first time, many years after its alleged perpetration, must show that within a reasonable time he has used due diligence to discover it, has followed up circumstances which would have put a prudent man upon inquiry, and has not slept upon his rights until the lapse of time and the death of parties charged with the fraud have destroyed the means of a full, fair, and satisfactory investigation in a court of justice. Moreover, in such a case the complaint must state facts from which it will appear to the court that ordinary prudence could not have discovered the fraud within the statutory period. "The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence": *Wood v. Carpenter*, *supra*. Statutes of limi-

tation are in great part founded upon the probability that during the course of many years witnesses will die, and recollections of events long past will become indistinct in the memories of the living. In the case at bar sufficient facts are not stated to show that the alleged fraud could not, with requisite diligence, have been sooner discovered. There was great opportunity for discovering the fraud, if any such existed, before the contract between the Burlings and William Sharon was made. That contract was not made in a hurry. Sharon's representations, alleged now to have been false, were not immediately accepted as true and promptly acted upon. Negotiations were continued for four months. Ralston, as appears from the complaint, was widely known in business circles, and had been accredited with great wealth. It is averred in the complaint that he was perfectly solvent, and that he had real and personal property, which passed to Sharon under the deed, of the aggregate value of \$9,000,000. It is averred, also, that he had real property of the value of \$6,000,000. If that was the fact, and the Burlings really had a legal claim against Ralston, it is almost beyond comprehension why they did not discover it, if not before the \$200,000 contract, at least before the death of William Burling, or before the lapse of the statutory period of limitation. The slightest examination of public records would have put them on the trail of the fact. It does not appear that they demanded an examination of the books, papers, etc., of Ralston. But no discovery was made, and it does not appear that any reasonable efforts were made for a discovery, of the alleged facts upon which this action rests until ten years after the date of the contract, and until after the death of said William Sharon. And it is averred that then "the means by which they obtained any information was by inquiring among their friends and acquaintances whether they (said persons) had any information relating to the dealings of said Sharon with said trust estate, and whether they had any information regarding the property which was conveyed by said Ralston to said Sharon in trust, as aforesaid." But such means were always within the power of appellants and the Burlings; and there are no sufficient facts alleged to show that the delay is "consistent with the required diligence": See *Ang. Lim.*, secs. 187, 190; *Hecht v. Slaney*, 72

Cal. 363, 14 Pac. 88; Moore v. Boyd, 74 Cal. 167, 15 Pac. 670.

Moreover, apart from the question of strict statutory limitation, the claim of appellants is too stale to be enforced in a court of equity. "No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere when there has been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has accrued. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transaction having become so obscured by time as to render the ascertainment of the exact facts impossible": Hammond v. Hopkins, 143 U. S. 250, 36 L. Ed. 134, 12 Sup. Ct. Rep. 418. In speaking of this rule, this court, in Bell v. Hudson, 73 Cal. 288, 2 Am. St. Rep. 791, 14 Pac. 791, said: "It is a material circumstance that the claim was not made until after the death of those who could have explained the transaction." In the case at bar, William Burling and William Sharon, "the principal participants in the transactions complained of," were both dead before the commencement of the action. It is quite apparent that no court could do "entire justice" in the premises without the testimony of William Sharon. Of course, if the suit had been commenced within a reasonable time, and William Sharon had died before his testimony could have been taken, the want of his testimony would simply have been one of those natural misfortunes which sometimes come to litigants. But William Sharon lived for ten years after the transaction complained of. William Burling died two years after the transaction, fully satisfied, as is averred, that it was a fair one. James W. Burling did business for several years afterward, and, until he became an insolvent, was also satisfied with the fairness of the transaction. There was perfect acquiescence by all parties for ten years, and while Sharon lived. It was not until he died, and his testimony was forever beyond human reach, that the claim of appellants grew

up and took the form of a suit against his successors. It is a claim which equity should not now entertain.

Under the foregoing views, we need not discuss the many other points made by respondents in support of the judgment. Judgment affirmed.

We concur: Garoutte, J.; Van Fleet, J.

HARRISON and FITZGERALD, JJ.—We concur in the judgment, upon the grounds last presented in the opinion of Mr. Justice McFarland.

DAVIS v. WALLACE, Judge.

No. 15,888; January 5, 1895.

38 Pac. 1107.

Mandamus will not Lie to Compel a Judge to Hear a matter notwithstanding an appeal, on the ground that the appeal is invalid, where the order appealed from is an appealable one.

Mandamus by Davis to compel William T. Wallace, judge of the superior court, to hear a matter notwithstanding an appeal. Petition denied.

PER CURIAM.—Petition for mandate to compel judge to hear a certain matter notwithstanding the pendency of an appeal, upon the ground that the appeal is invalid. The order appealed from is an appealable order: *Livermore v. Campbell*, 52 Cal. 75. Whether the appellant was really a "party aggrieved" is a question which we cannot determine on this proceeding. The petition is denied and the proceedings dismissed.

SANTA ROSA CITY R. CO. v. CENTRAL ST. RY. CO.*

No. 15,202; January 6, 1895.

38 Pac. 986.

Municipal Ordinance—Presumption as to Adoption.—Where for Fourteen Years after the passage of an ordinance the city recognized its existence and validity, and treated it as duly adopted and published, it will be presumed to have been approved by the mayor and published as required by the city's charter.

Municipal Ordinance—Certificate of Publication.—Where a city charter requires that ordinances shall be published only by order of the council, and that the city clerk shall keep a book into which he shall copy each ordinance, with a certificate annexed to the copy stating, among other things, that it was published according to law, the certificate of the clerk that the ordinance was published is sufficient evidence that the order for publication was made.

Franchise.—The Right to Avoid a Public Grant for Failure to perform a condition subsequent is confined to the government.

Franchise.—A Public Grant cannot be Avoided for Failure to perform a condition subsequent, except through a court's judgment, or a legislative declaration of forfeiture, unless the statute creating the condition expressly declares that a failure to perform it will, ipso facto, avoid the grant.

Street Railway Franchise—Forfeiture—Statute not Self-executing.—Under the Civil Code (section 502), providing that, where a franchise has been granted to a street railroad, work on the road must be commenced within one year from the date of the grant of right of way, and finished within three years thereafter, and that a failure to comply with such provision "works a forfeiture" of the right of way as well as of the franchise, when a street railroad fails to comply with that provision, its right of way and franchise continue to exist until declared forfeited by a court or by legislative authority, said section not being self-executing.

Street Railway Franchise—Manner of Forfeiture.—When a city railroad's franchise is liable to forfeiture for a breach of condition subsequent, forfeiture thereof is not effected by the city's granting the same rights to another company.

Street Railway Franchise—Estoppel to Claim Forfeiture.—Where a city granted a street railroad franchise to two persons, who organized a corporation to operate a railroad thereunder, and thereafter the franchise became liable to forfeiture because the road was

*For subsequent opinion in bank, see 112 Cal. 436, 44 Pac. 733.

not constructed on certain streets within the specified time, but for eleven years after the breach, with full knowledge thereof, the city, in dealing with the company, by resolutions, orders, and ordinances, recognized the franchise as valid and in force, and took legal steps to enforce the obligations assumed by the company thereunder, and the company in consequence incurred expense in paving the streets on which its tracks were laid, and in paying taxes, the city and the public are estopped to claim a forfeiture of the franchise or deny the company's ownership thereof.

Street Railway.—Where a Street Railroad Franchise was Granted to two persons, and they thereupon organized a corporation for the express purpose of constructing and operating a railroad under the franchise, and so declared in the articles of incorporation, an assignment of the franchise by said persons to the corporation was not necessary to vest the latter with any right relating thereto.

Street Railway—Injunction Against Another Company.—In an action by a street railroad company, operating its road under a franchise, to enjoin another railroad company, claiming the right to construct a road on the same street under a subsequent franchise, from tearing up plaintiff's tracks, plaintiff need not show ownership of the franchise under which it operates, its actual possession of the street being sufficient as against defendant.

Street Railway—Injunction Against Another Company.—Where a street railroad company, claiming the right to construct its road over a street under a franchise, tears up the tracks and interferes with the operation of the road of another company already operating on said street under a prior franchise, the latter may bring an action to enjoin said acts, and recover its actual damages on account of them.

Street Railway—Injunction Against Another Company.—In an action by the company to enjoin the tearing up of its tracks, an ordinance passed after its franchise became liable to forfeiture, granting plaintiff the right to construct a switch, which right should "extend until the expiration of the term of the franchise" first granted, was admissible, as tending to show both the original existence of the franchise and a waiver of the forfeiture.

Municipal Ordinance—Order for Publication.—Testimony of a City Clerk that after search he was unable to find among the city records any orders for the publication of certain ordinances is admissible to show the nonexistence of those orders.

APPEAL from Superior Court, Sonoma County; S. K. Dougherty, Judge.

Action by the Santa Rosa City Railroad Company against the Central Street Railway Company for an injunction and

damages. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

Barham & Bolton and Van R. Paterson for appellant; W. F. Russell and Rutledge & Pressley for respondent.

VAN FLEET, J.—This is an action for an injunction to restrain defendant from tearing up the track of plaintiff's railroad, and from interfering with the running of plaintiff's cars, and for damages for acts of interference already committed. A preliminary injunction was granted; but, on the hearing, the injunction was dissolved, and judgment rendered for defendant. Plaintiff appeals from the judgment and an order denying its motion for a new trial.

On the trial the following facts were proved without any substantial conflict: On October 3, 1876, Mark L. McDonald and Jackson R. Meyers petitioned the common council of the city of Santa Rosa to grant to them and their assigns the privilege of constructing and operating a street railroad on certain streets of said city. On the same day the common council passed a resolution granting to the petitioners and their associates the privilege requested. On May 11, 1877, the petitioners and certain other persons incorporated the corporation plaintiff, for the express purpose of constructing and operating said street railroad, and it was so stated in the articles of incorporation. On June 5, 1877, the city council passed an ordinance, numbered 16, granting to said McDonald and Meyers, "their associates, successors, or assigns," authority to construct said railroad, and to maintain the same and propel cars thereon for the term of fifty years. This ordinance, among other things, provided that the tracks should be kept "flush and even with the street," and that the holders of the franchise should "plank, pave, or macadamize the entire length of the street used by the track, between the rails and for two feet on each side thereof." This ordinance is found, in regular order, in the official book of ordinances of the city, with the signatures of the mayor and clerk, but without the certificate required by section 19 of the act incorporating the city (Stats. 1875-76, p. 251); and there was no direct evidence of the publication or posting of said ordinance, as required by section 22 of that act. Plain-

tiff immediately commenced the construction of said road, and during the year 1877 completed the portion in controversy in this action, and has ever since continued to operate that portion; but on certain portions of the route named in the application and ordinance no railroad has ever been constructed or operated. In 1884 the city council undertook a revision of all the ordinances of the city then in force, and for that purpose, on July 15, 1884, passed an ordinance, numbered 59, which, among other things, contains the whole of said ordinance 16. Ordinance 59 is found duly recorded in the book of ordinances, with the certificate of the clerk required by the charter. On January 6, 1886, the council adopted a resolution directing the street commissioner to notify McDonald "to place the street railroad on the proper grade, and have the same macadamized in accordance with the ordinance." On January 19, 1886, the council adopted a resolution authorizing the city engineer to furnish plaintiff with the grade "of the railroad track on Fourth street," which is the street now in controversy. On September 14, 1886, the council adopted a resolution requiring the plaintiff "to pave the space between the rails of its road, and for two feet on each side, with bituminous blocks" of a certain kind, and to substitute flat rails for "the rails now used," and to put and keep the track flush with the street; and directing the city attorney, in case of a failure of the plaintiff to comply with said requirements, to commence an action "to have said track declared a nuisance and removed, and the right to maintain a street railroad annulled and revoked." On September 21, 1886, the council directed the city attorney at once to commence the action provided for in the previous resolution. On December 27, 1886, the city attorney commenced said action in the name of the city, and filed a complaint in which, among other things, it was alleged that the plaintiff here (defendant in that action) was organized for the purpose of building, equipping, and operating said railroad, and had built and equipped the same about June 7, 1877, and had ever since operated the same; and that, before commencing said road, it had applied for and obtained from the city permission to lay down and operate said railroad for fifty years. A demurrer was interposed to that complaint, and sustained; and on November 16, 1888, the city

attorney reported that fact to the council, and also reported that plaintiff had commenced the work of paving as required by the resolution, and was putting the road into excellent condition, and recommended the dismissal of the action. Pending that action, on May 4, 1888, the council passed a resolution granting to plaintiff the right to establish a certain switch. On March 3, 1891, the council passed a resolution declaring plaintiff's railway on Fourth street to be a nuisance, "except that portion of said railway already in repair, flush and even with the street, and with good crossings." Thereupon plaintiff proceeded to and did put said track in good repair, and so as to cover the objections made. From 1877 down to the commission, in 1891, of the acts complained of in this action, the plaintiff has been in the actual, continuous, and notorious occupation of this railroad, has operated the same, and collected fares thereon, and regularly paid taxes thereon, and neither its possession nor its right to operate its road was ever disputed by anyone. On September 2, 1891, the city council passed an ordinance, numbered 132, granting to defendant the right to construct and operate a street railroad on certain streets in said city, including a portion of Fourth street, on which plaintiff's track was laid. Under authority of this ordinance defendant commenced the construction of its road, and, as a part of that work, commenced to tear up and remove plaintiff's track; whereupon this action was commenced. Defendant undertakes to justify its acts on the grounds that plaintiff never obtained any franchise whatever, or, if it did, that that franchise was forfeited by the failure of plaintiff to complete the whole of its road within the time prescribed by section 502 of the Civil Code; and that its track was therefore a public nuisance, which defendant could lawfully abate in the exercise of its own franchise. We think that under the evidence in the case plaintiff did obtain a valid franchise to construct and operate its road on Fourth street; that that franchise was never forfeited; and that plaintiff is therefore entitled to an injunction, and such damages as it has suffered by reason of the acts complained of.

1. Defendant contends that ordinance 16, the original ordinance under which plaintiff claims, was never approved by the mayor, nor published or posted as required by law, and

that it therefore never took effect. Section 22 of the city charter provides that "all ordinances shall be signed as nearly as may be in the following form: Approved this — day of —, —, Mayor of the City of Santa Rosa." The ordinance in question is signed by the mayor, but without any words of approval. Section 46 requires the mayor to sign such ordinances as he approves, and there was some parol evidence tending to show that the mayor did approve this ordinance, and signed his name with that intention. We are inclined to hold that that provision of section 22 is merely directory, and that the signature of the mayor, under the circumstances of the case, is sufficient evidence of his approval; but it is not necessary to decide that question. Section 22 also provides that every ordinance "shall be published in some newspaper in Santa Rosa at least one time, or posted in three public places in said city, and shall be in force ten days after such publication or posting." Section 19 provides that the city clerk "shall keep a book marked 'City Ordinances,' into which he shall copy all city ordinances, with his certificate annexed to said copy, stating the foregoing ordinance is a true and correct copy of an ordinance of the city of Santa Rosa, and giving the number and title of said ordinance, and stating that the same has been posted or published according to law. Said record copy shall be prima facie evidence of the contents of the ordinance and of the passage and publication of the same, and shall be admissible as evidence in any court or proceeding. Nothing herein contained shall be construed to prevent the proof of the passage and publication of ordinances in the usual way." Ordinance 16 was copied by the clerk into that book, but without any certificate, nor was there any direct evidence of its publication or posting. There can be no doubt that publication in a newspaper or by posting is made by that statute a condition precedent to the taking effect of any ordinance; but it does not follow that direct proof of that fact is essential in any case. The statute expressly allows the passage and publication of ordinances to be proved "in the usual way"; that is, by such proof as would be sufficient to prove such facts in any other case. In this case the proof is overwhelming that the city, from the time of the passage of this ordinance, has always recognized its existence and validity,

has acted upon it, and, both by its action and its nonaction, has treated it as duly adopted and published. As we shall show hereafter, the defendant has no rights in this action which the city would not have, and the case is to be treated precisely as if the city, instead of the present defendant, were the party to the record. The circumstances in proof raise, after the lapse of fourteen years, a sufficient presumption of the existence of every fact necessary to the validity of the ordinance, including approval by the mayor and publication; certainly sufficient against the city and the defendant here. As was said in *City of Atchison v. King*, 9 Kan. 550, 556: "The city having passed the ordinance four or five years before it was offered in evidence, and having acted upon it as valid, will not now be allowed in such an action to deny its publication. Such a rule would be a great inducement to cities to disobey the law. They get the benefits and escape the inconveniences of the law by such a course, as it would in most cases be impossible for a stranger to prove a publication four or five years after the passage of the ordinance, when the publication is by posted notices. Nor would the difficulty be much less where it was published in a newspaper, in a country where newspaper changes are as frequent as they are in this state. It was the duty of the city authorities to publish the ordinance. As they acted on it, the presumption is that it was duly published; and at least this presumption is sufficient till the contrary appears": See, also, *City of Quincy v. Chicago, B. & Q. R. Co.*, 92 Ill. 21. But, aside from this, ordinance 16 was re-enacted in ordinance 59, and the publication of that ordinance was proved by the statutory certificate of the clerk. The statute does not limit the time within which ordinances may be published; and the publication of the latter ordinance was a publication of the former, and therefore rendered it effective in ten days from the time of such publication. For all the purposes of this action that is sufficient. It is contended by defendant that ordinances can be validly published only by order of the city council; and that, as no such order of publication can now be found in the minutes of the council, the publication of ordinance 59 was ineffectual. But the charter does not, either in terms or by implication, require such an order, and the authorities relied on by defendant are inapplicable

(County of San Luis Obispo v. Hendricks, 71 Cal. 242, 246, 11 Pac. 682); and, if such an order were necessary, the certificate of the clerk is sufficient evidence that it was made. These considerations render it unnecessary to decide whether, under section 497 of the Civil Code, this privilege might not have been granted by simple resolution without any publication. Neither the city charter, nor the section of the code referred to, nor any general rule of law, requires an ordinance in such a case: Atchison Board of Education v. De Kay, 148 U. S. 591, 37 L. Ed. 573, 13 Sup. Ct. Rep. 706. Defendant relies on the use of the word "ordinance" in sections 498 and 502 of the Civil Code. The use of that word in those sections would hardly seem to be a sufficient reason for interpolating it into section 497; but, for the reason above stated, that question need not now be determined.

2. Defendant next contends that plaintiff, by its failure to construct its road on certain of the streets named in Ordinance 16, ipso facto forfeited its entire right of way and franchise, as well for those portions constructed as for those not constructed, and that all its rights thereby ceased and determined at the expiration of three years from the date of that ordinance. This contention is based on section 502 of the Civil Code, which reads as follows: "Work to construct the railroad must be commenced within one year from the date of the ordinance granting the right of way and the filing of articles of incorporation, and the same must be completed within three years thereafter. A failure to comply with these provisions works a forfeiture of the right of way as well as of the franchise, unless the uncompleted portion is abandoned by the corporation with the consent of the authorities granting the right of way, such abandonment and consent to be in writing." It is conceded that plaintiff did not complete the work of constructing its railroad within the period prescribed, and has never completed it; but it cannot be denied that it commenced that work within one year. Under the rule laid down in Omnibus Railroad Co. v. Baldwin, 57 Cal. 160, it would seem that no forfeiture can occur unless the holder of the franchise is in default in both particulars—in failing to commence the work within one year, and in failing to complete it within three years. But, as that question has not been argued by counsel, we do not pass

upon it. Assuming, then, that a failure to complete the road within three years, though commenced in time, "works a forfeiture" within the meaning of section 502, the question to be determined is whether that statute is self-executing; that is, whether the right of way and franchise absolutely cease to exist at the end of that period, or whether a judicial or legislative declaration of forfeiture is necessary to produce that result. It is obvious that the requirement as to the completion of the work within a given time is a condition subsequent. It is a general rule that none but the grantor or his heirs can avoid a grant for failure to perform a condition subsequent; and in case of a public grant, the right to avoid it on that ground is confined to the government, and can be exercised only through the judgment of a court, or by a legislative declaration of forfeiture. It follows that, where such condition is imposed by statute, a failure to perform it will not ipso facto avoid the grant, unless so declared by the statute creating the condition. Unless the statute, by express terms or by plain implication, so declares, no forfeiture will take place without a judicial, or at least a legislative, determination to that effect: *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, 22 L. Ed. 551. The statute in question provides that a failure to comply with its provisions "works a forfeiture" of the right of way and franchise. This section, as shown by the note of the code commissioners, was taken from section 8 of the street railroad act of March 29, 1870 (Stats. 1869-70, p. 483), which provided that, upon such failure, "all rights of the grantee under the order or ordinance shall be forfeited and shall thenceforth cease and determine." The latter portion of the provision, according to some of the decisions in this state, evinced an intention on the part of the legislature to dispense with any further proceeding to declare a forfeiture, for the rights of the party were upon the default to "cease and determine." The omission of those words in the code, an omission which we must presume to have been deliberate and intentional, indicates an intention to mitigate the former rule. The words "work a forfeiture," which are the only words used in the code, are usually understood to mean merely that the default mentioned is a ground for forfeiture—a ground for a judicial declaration of forfeiture (*People v. Hillsdale etc. Turnpike*,

23 Wend. (N. Y.) 256); and they do not appear to mean more in this case. The great weight of authority without this state establishes the rule that a statutory provision that in case of default a party shall forfeit his rights, or that a thing granted shall be forfeited or shall revert to the government, or the like, merely exposes the party to proceedings for forfeiture on behalf of the state, and does not of itself divest those rights. Such a provision will not be held self-executing, unless further words are used plainly implying such a legislative intent. The cases are too numerous to be reviewed, but a few of them may be noted: *In re Brooklyn El. R. Co.*, 125 N. Y. 434, 26 N. E. 474; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, 22 L. Ed. 551; *In re Kings County El. Ry. Co.*, 105 N. Y. 97, 119, 13 N. E. 18; *Chesapeake & O. Canal Co. v. Ohio R. Co.*, 4 Gill & J. (Md.) 1, 121; *Briggs v. Cape Cod Co.*, 137 Mass. 71; *Wallamet Falls C. & L. Co. v. Kittridge*, 5 Saw. 44, Fed. Cas. No. 17,105; *Frost v. Coal Co.*, 24 How. 283, 16 L. Ed. 637; *Railroad Co. v. Johnson*, 49 Mich. 148, 13 N. W. 492. In this state the cases are not altogether consistent with each other, nor in harmony with the decisions elsewhere. In *Borland v. Lewis*, 43 Cal. 569, the words construed were: "Such neglect or failure shall work a forfeiture of such lands, and the same shall be resold as if no purchase had been made." This statute was held self-executing, on the ground that the last clause would be useless if the resale could not be made until the forfeiture had been pronounced by a court. In *Oakland R. Co. v. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, 13 Am. Rep. 181, the words, "the franchises and privileges herein granted shall utterly cease and be forfeited," were held to accomplish the forfeiture without the necessity of judicial proceedings. In *Upham v. Hosking*, 62 Cal. 250, the same ruling was made as to the words, "the rights granted by this act shall become forfeited to the state." This was decided upon the supposed authority of the two preceding cases, and without any further reason stated. Those cases were clearly not authority for that ruling, for in each of them the decision was rested on language beyond the words of forfeiture—"shall be resold as if no purchase had been made"; "shall utterly cease." In *People v. Railway Co.*, 91 Cal. 338, 27 Pac. 673, it was remarked that acts sufficient to cause a for-

feiture do not per se produce a forfeiture, without proper proceedings in a proper court. In *Town of Arcata v. Arcata & M. R. R. Co.*, 92 Cal. 639, 28 Pac. 678, it was said: "Where the statute provides that a failure to complete the contemplated work within a certain time shall work a forfeiture, no action is necessary to enforce the forfeiture. In such a case, upon the happening of the event of the commission of the offense which is the statutory basis of forfeiture, the title to the thing forfeited immediately vests in the state." It was, however, expressly held that that question did not arise in the case, and the language quoted must therefore be considered obiter dictum.

We think that the true rule on this subject is that laid down in the cases cited above from other courts, and that the case of *Upham v. Hosking* and the dictum in the *Town of Arcata* case cannot be supported upon principle. If this statute ex proprio vigore produces a forfeiture without further legislative or judicial action, it does so absolutely and unconditionally. If the grantee of the franchise should commence the work within the year, and thereafter diligently prosecute it, and should, within the three years, complete it with the exception of a single block, its entire road would be forfeited, even though its failure to complete that block should be caused by the occupation of the city by hostile troops, or by a destructive pestilence, or any other cause entirely beyond its control. If, on the very next day after the expiration of the three years, it should complete its road, and thereafter operate it for ten years, it might then be ousted without redress. It might happen that such a road, in a small place, could be operated for many years only at a loss; yet the moment it became profitable a rival might step in and avail itself of a forfeiture occurring many years before, and never thought of by anyone. The injustice that might be done in such cases would be avoided, and private as well as public rights protected, if resort must be had to legal proceedings. It is therefore reasonable to suppose that the legislature in general intends that a forfeiture shall be enforced only by judicial action, or, in a proper case, by express legislative declaration; and that, when it intends otherwise, it will use apt and plain language to that effect. The language used in the section under consideration evinces no such intention; and,

until a judgment of forfeiture is obtained or the forfeiture is declared by legislative authority, the franchise and right of way continue to exist. It is not necessary, for the purposes of this case, to decide whether, in a case like the present, a mere legislative declaration of forfeiture would be sufficient. The authorities do not agree as to when, if ever, a forfeiture can be enforced in that way. It is sufficient to say that in this case no such legislative declaration was ever made by the city council or any other body. It is well settled that a mere grant to a third party will not, of itself, effect the forfeiture; and the ordinance granting the franchise to defendant expresses no such intention, and is not in any way inconsistent with the continuance of plaintiff's franchise.

From the principles above laid down, it follows that no one but the government can avail itself of a ground of forfeiture of a public grant; and that the government being the sole judge of the propriety of such action, may waive the right to enforce or declare a forfeiture. Such waiver may be by express legislative action, or may be inferred from other acts of the governmental authority. Accordingly, when the state, or any subordinate governmental body to whose charge the matter has been committed, after knowledge of the act or omission constituting a ground of forfeiture, does any act which unequivocally recognizes the franchise as still existing and in force, a waiver of the forfeiture will be inferred. And if such act of recognition has the effect of causing the holder of the franchise to incur expense which he would not have incurred had the forfeiture been insisted on, or otherwise to change his position, the inference of a waiver becomes conclusive, on the ground of estoppel. These propositions are supported by an overwhelming weight of authority; indeed, no case to the contrary has been brought to our attention: *New Orleans, C. & L. R. Co. v. City of New Orleans*, 44 La. Ann. 748, 11 South. 77; *Chicago, R. I. & P. R. Co. v. City of Joliet*, 79 Ill. 25, 37; *City of Atlanta v. Gate City Gaslight Co.*, 71 Ga. 106, 125; *State v. Fourth N. H. Turnpike*, 15 N. H. 162, 41 Am. Dec. 690; *Martel v. East St. Louis*, 94 Ill. 67; *Trustees of McIntire Poor School v. Zanesville C. & M. Co.*, 9 Ohio, 203, 290, 34 Am. Dec. 436; *State v. Mississippi, O. & R. R. Co.*, 20 Ark. 495; *In re New York El. R. Co.*, 70 N. Y. 338; *State v. Taylor*, 28 La. Ann. 460. In the present

case the acts of recognition by the city council of the continued existence of plaintiff's franchise have been numerous and unequivocal. For fourteen years, of which at least eleven years were after the alleged ground of forfeiture had occurred, the city in every possible way, by direct dealing with plaintiff, by its public resolutions, orders and ordinances, and by its pleadings in a judicial proceeding, recognized plaintiff's franchise as valid and in force, and insisted upon and took steps to enforce the obligations assumed by plaintiff by its acceptance of that franchise. In consequence of those official acts, plaintiff incurred expense in paving the public street, in paying taxes, and in other ways, which it would certainly not have incurred had the alleged forfeiture been insisted upon. As the fact that plaintiff had not constructed its railway on certain streets was necessarily one of public notoriety, it must be presumed that the city council had knowledge of it; and its acts, in view of that knowledge, conclusively import a waiver of the right to insist upon a forfeiture, and estop the city from ever claiming that a forfeiture has occurred. As the city is by law the agent of the public for this purpose, this estoppel extends to the whole public, and binds the defendant and all other persons: *People v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54. It is therefore clear that the failure of plaintiff to complete its road afforded no justification to defendant for any interference with plaintiff's track. Whether, in any case, a private individual or corporation has the right to remove from a public highway a railroad track in actual use therein, though laid without authority, where such track does not amount to a complete obstruction of the highway, we need not decide; but see *Market St. Ry. Co. v. Central Ry. Co.*, 51 Cal. 583.

3. Defendant contends that no assignment having been proved from McDonald and Meyers to plaintiff, plaintiff cannot maintain this action. But as McDonald and Meyers were two of the original incorporators of plaintiff, and as plaintiff was incorporated for the express purpose of building and operating this railroad, no assignment was necessary. Besides, the acts of the city council referred to recognize plaintiff as the owner of the franchise, and estop the city and the defendant from claiming the contrary. Moreover, as against

defendant, which is a mere trespasser, plaintiff's actual possession is sufficient.

4. The acts of defendant, complained of in this action, would amount to a complete destruction of plaintiff's property, and a permanent obstruction to its right of way. As they were committed under a claim of right, injunction is the proper remedy (*Moore v. Waterworks*, 68 Cal. 146, 8 Pac. 816); and plaintiff may also, in this action, recover its actual damages.

5. On the trial plaintiff offered in evidence an ordinance of the city, duly passed July 10, 1889, and numbered 110, granting to plaintiff the right to construct on Fourth street a switch, to be "connected with the main track of the Santa Rosa Street Railroad, now laid and constructed on said Fourth street." In that ordinance it was provided that the term of the franchise thereby granted should "extend until the expiration of the term of the franchise for laying, etc., the main track of the Santa Rosa Street Railroad." This ordinance was excluded by the court on defendant's objection that it was "irrelevant, immaterial and incompetent." From what has been said above, it follows that this ruling of the court was error. The ordinance contained an unequivocal recognition of plaintiff's franchise, and therefore tended to show both the original existence of the franchise and a waiver of the alleged forfeiture.

6. The court did not err in admitting the testimony of the city clerk, Jordan, to the effect that, after search, he had been unable to find among the city records any order for the publication of Ordinances 16 and 59. That is a well-recognized method, and often the only available method, of proving the loss or nonexistence of a record. This testimony was, however, unimportant for the reasons before stated. The findings and conclusions of the court below are in conflict with the views herein expressed; and the judgment and order appealed from are therefore reversed, and the cause remanded for a new trial.

We concur: McFarland, J.; Fitzgerald, J.

GAROUTTE, J.—I concur in the judgment, and also concur in the conclusions arrived at by Mr. Justice Van Fleet

upon the first and second propositions discussed by him. But, by reason of the conclusions there reached, I think the matter of an estoppel as against the city becomes immaterial, and therefore the city should not be foreclosed from litigating that question in the future by some proper action, if it deem such course advisable.

DE HAVEN and HARRISON, JJ.—We dissent from the judgment. The failure of the plaintiff to complete the whole of its road, for the construction of which its franchise was granted, within the time prescribed by section 502 of the Civil Code, worked a forfeiture of the franchise; and the subsequent action of the city of Santa Rosa in granting to defendant the right to construct and operate its road over a portion of the same streets named in plaintiff's forfeited franchise gave to defendant the right to enforce and insist upon such forfeiture in this action.

PEOPLE v. SWEARINGER.

No. 21,148; January 14, 1895.

38 Pac. 972.

Appeal—Notice—Record.—An Appeal will be Dismissed where the record does not show service of the notice of appeal, required by Penal Code, section 1240, and no certificate of the clerk that there was service has been filed, though permission to file such certificate, on the ground that the failure of the record to show such service was due to an error of the printer, was asked several months before the dismissal.

APPEAL from Superior Court, Mendocino County; R. McGarvey, Judge.

A demurrer to the information against W. H. Swearinger was sustained, and the people appeal. Dismissed.

J. E. Pemberton for the people; J. A. Cooper for respondent.

BELCHER, C.—The information in this case charges that on the fifteenth day of August, 1893, in the county of Mendocino, the defendant, W. H. Swearinger “did willfully, unlawfully, and feloniously alter and deface the earmarks and brand of one certain roan spotted yearling steer, the property of and belonging to one P. M. Bucknell, with the intent to thereby steal the same, and to prevent identification thereof by the said P. M. Bucknell, the true owner.” The defendant demurred to the information upon the ground that it did not state facts sufficient to constitute a public offense. The demurrer was sustained, and from the order or judgment thereupon entered the people appeal.

The record does not show that the notice of appeal was served upon the attorney of the adverse party, or upon anyone, as required by section 1240 of the Penal Code, and on that ground the respondent moves to dismiss the appeal. The appellant, in the reply brief, admits that the record is defective in not showing that the notice of appeal was served, but says that it was in fact properly served, and that the omission was an error of the printer. A diminution of the record is then suggested, and leave is asked “to file a certificate of the clerk of the court below showing that there was due service.” The reply brief was filed August 2, 1894, but no certificate of the clerk of the court below, or other paper, showing that there was due service, has been filed in this court. It follows that the appeal cannot be considered, and that it should be dismissed: *People v. Phillips*, 45 Cal. 44; *People v. Clark*, 49 Cal. 455; *People v. Bell*, 70 Cal. 33, 11 Pac. 327.

We concur: Vancielief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the appeal is dismissed.

In re LI PO TAI'S ESTATE.*

LI TAI WING v. FREESE, Public Administrator.

No. 15,746; January 28, 1895.

39 Pac. 30.

Administrator With Will Annexed—Right to Remove.—Code of Civil Procedure, section 1383, providing that when letters of administration have been granted to any other than the surviving wife, child, etc., of the intestate, any one of them may obtain the revocation of the letters, and become entitled to the administration, does not apply to letters of administration with the will annexed.

APPEAL from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Petition by Li Tai Wing for the removal of A. C. Freese, public administrator, as administrator with the will annexed of Li Po Tai, and that letters of administration with the will annexed be issued to petitioner. From an order denying the application, petitioner appeals. Affirmed.

Alexander D. Keyes and Philip Teare for appellant; J. D. Sullivan, R. H. Countryman and Wm. Willett for respondent.

PER CURIAM.—On the 28th of February, A. D. 1894, appellant, Li Tai Wing, filed a petition in the probate court of the city and county of San Francisco, in which, with other allegations, he stated that Li Po Tai died in said city and county March 20, 1893, testate; that by his will he nominated petitioner and his mother executor and executrix of the will; that at the time of the death of Li Po Tai, and when the will was probated and letters testamentary were issued to his mother, petitioner was a minor, and was absent from the state of California; that his mother, Lee See, was appointed executrix April 11, 1893, and duly qualified; that afterward, on the twenty-seventh day of October, 1893, said Lee See was removed from office, and her said letters revoked, and afterward, on the fifteenth day of November, 1893, A. C.

*For subsequent opinion in bank, see 108 Cal. 484, 41 Pac. 486.

Freese, public administrator, was appointed administrator with the will annexed to take charge of the estate, and said Freese duly qualified, and is still acting as such administrator; that said Freese was not the husband or wife, child, father, mother, brother or sister of said Li Po Tai, deceased. Petitioner is the eldest son of said Li Po Tai, is over the age of twenty-one years, and a resident of the city and county of San Francisco; wherefore, he asked that the letters of administration issued to A. C. Freese be revoked, and letters of administration with the will annexed be issued to petitioner. Freese was duly cited to appear and answer. He filed no answer, but did appear, and was allowed to contest the right of the petitioner. Petitioner bases his claims upon the language of section 1383, Code of Civil Procedure, and succeeding sections. He contends that under these provisions his right to relief asked is absolute, provided only that he be found to possess the statutory competency. Section 1383 is expressly limited to the estates of those who died intestate, and section 1354 is made applicable to the estates in which a will has been probated and an administrator with the will annexed has been appointed. The last section, however, does not provide that the administrator with the will annexed may be removed to permit a relative or a person entitled to administer to be appointed; but only one who has been named as executor. In section 1350 it is provided that, if it becomes necessary to appoint an administrator with the will annexed, they must be issued as designated and provided for in the grant of letters in case of intestacy. Section 1426 provides that, if the administrator with the will annexed become incapable or die, "letters of administration with the will annexed may be issued to the widow, or next of kin, or others, in the same order and manner as directed in relation to original letters of administration." Appellant contends that a fair construction of these sections indicates that the legislature intended that the rules for the issue of letters of administration with the will annexed shall be the same as the rules for the issuance of letters of administration where the decedent has died intestate. Inasmuch as the statute in regard to the requirement that an administrator may be required to give way to the claims of another expressly limits its operation to estates of those who died intestate, this

would not be to construe a statute, but to add to it. Section 1354 only provides that an administrator with the will annexed shall be removed in favor of one who has been named executor, and leaves that to the discretion of the court. Under section 1383, the right of the relative possessing the statutory competency seems to be absolute. Is there any reason in the nature of the two offices for this difference? I think there is, though, without such reason, the law, being unambiguous, must prevail. In the first place, where there is a will, the next of kin may have no interest in the estate, and there may be no reason why he should be put in charge of it. But there is, I think, a better reason in the case of an administrator with the will annexed—the matter should be left to the sound discretion of the court. Under section 1356 of the Code of Civil Procedure, administrators with the will annexed have the same authority over estates which executors named in the will would have. Executors often have to execute trusts reposed in them by the testator very different from those which administrators assume under the statute. These trusts vary greatly. They may require time and delicate management to perform. While in the performance of such a trust it might be very unfortunate for the estate if at any time one near of kin could stop the proceeding, and have a change in the administration. But, whether the reason suffices or not, the statute seems plain. Appellant applied to have respondent removed, and to be himself appointed executor. That application the probate judge had already refused. Appellant immediately made this application to be appointed administrator with the will annexed. Is the court now compelled to give him the same office, under another name, which it had already refused, using a discretion expressly conferred upon it by statute? It is obvious that the statute has not given appellant any such privilege. *Estate of Pacheco*, 23 Cal. 476, is cited as an authority for appellant's proposition. When that decision was made, there was no provision such as is now found in section 1354 of the Code of Civil Procedure, giving a discretion to the probate judge. The different policies as to the removal of administrators with the will annexed and ordinary administrators were not as marked then as now. The order appealed from is affirmed.

Ex Parte COOK et al.

No. 21,197; February 4, 1895.

39 Pac. 16.

Justice of Peace—Jurisdiction of Crime in Another County.—

A justice of the peace has no jurisdiction of the crime of embezzlement committed in another county.

Petition by Joseph E. Cook and Thomas E. Langley for habeas corpus and release from commitment by a justice of the peace. Writ granted.

Myrick & Deering and Wm. S. Wells for petitioners; C. Y. Brown for respondent.

PER CURIAM.—Habeas corpus. Petitioners have been held to answer, after examination before a committing magistrate, for the crime of embezzlement, and ask to be discharged upon the ground that they were committed without reasonable or probable cause. The specific charge is that they embezzled certain fruit which was received by them in the county of Contra Costa under a contract by which they agreed to incur certain expenses for packing, shipping, etc., and to sell the fruit in Eastern markets for account of the growers on commission. The evidence in the deposition shows that they did with the fruit precisely what they contracted to do, but they failed to pay over to the growers the whole amount of their share of the proceeds. It is clear from the evidence that there was no embezzlement of the fruit. If any embezzlement has been committed it was of the proceeds, and was committed in San Francisco, and not in Contra Costa. The magistrate who issued this commitment (a justice of the peace of Contra Costa county) had no jurisdiction of the only offense which the evidence has the slightest tendency to establish. Prisoners discharged.

CHAPMAN v. PENNIE.

No. 15,520; February 5, 1895.

39 Pac. 14.

Foreclosure—Deficiency Judgment—Action Against Administrator.—An action cannot be maintained against an administrator for a deficiency judgment on foreclosure, where the decedent, the mortgagor, was a nonresident at the time of commencement of the action to foreclose, remained away from the state until after the sale thereunder, and never appeared in the action.

Bankruptcy.—On the Same Day That a Discharge in bankruptcy was granted to B., the maker of a note and mortgage, "from all debts and claims which are made provable against his estate," a stipulation was entered into between B. and C., the owner of the note, whereby it was agreed that the interest should be reduced, that the note should be extended, and that proceedings to enforce its payment should be dismissed. Held, that, as it did not appear that the agreement to pay the note was made after the discharge, the parties did not intend to make a new contract on which the bankrupt could be held, but only to extend the time and reduce the interest of the note and mortgage.¹

APPEAL from Superior Court, City and County of San Francisco; Wm. T. Wallace, Judge.

Action brought by E. W. Chapman against James C. Pennie, administrator of the estate of John Bensley, deceased, to compel him to pay a deficiency judgment on the mortgage note of his decedent. Judgment rendered for defendant. Plaintiff appeals. Affirmed.

T. M. Osmont for appellant; Naphtaly, Friedenreich & Ackerman for respondent.

PER CURIAM.—The deceased, John Bensley, made his promissory note to the Nevada Bank of San Francisco, November 24, 1875, for the sum of \$80,000, payable one year thereafter at the rate of one and one-fourth per cent per month, and to secure the same executed to the Nevada Bank

¹ Cited in the note in 135 Am. St. Rep. 386, on revival of debt discharged in bankruptcy.

a mortgage upon certain real estate in the city and county of San Francisco. January 19, 1881, the Nevada Bank commenced an action upon the promissory note against Bensley and others for the foreclosure of the mortgage given as security for the payment therefor. Bensley was absent from the state, and service upon him was had by the publication of summons. Judgment was rendered in that action, January 5, 1882, for the foreclosure of the mortgage and the sale of the premises, and providing that in case of a deficiency in the proceeds of the sale the judgment for such deficiency should be docketed against the defendant, Bensley. Under this judgment an order of sale was issued to the sheriff of the city and county of San Francisco; and on the 10th of August, 1882, he returned the order of sale, from which it appeared that, after applying the proceeds of the sale upon the judgment, there was a deficiency of \$37,721.51. Judgment for this deficiency was then docketed by the clerk against Bensley. December 10, 1889, the Nevada Bank assigned the said promissory note to T. M. Osmont, and on the 21st of May, 1890, Osmont assigned the same to the plaintiff. The plaintiff has brought this action upon the aforesaid promissory note, setting forth in his complaint that the sum of \$37,721.51, with interest, is unpaid thereon, and alleging that on the 26th of May, 1890, he presented his claim for the said deficiency to the defendant, as the administrator of Bensley's estate, for allowance, and that it was by him rejected. Judgment was rendered for the defendant in the court below, and the plaintiff has appealed directly therefrom upon the judgment-roll alone, without any statement or bill of exceptions.

In his brief herein counsel for appellant states: "The sole question involved in the case—assuming that such defense may be made without pleading—is whether an action can be maintained against an administrator for a deficiency arising upon the sale of mortgaged premises pursuant to a decree of foreclosure against the decedent in his lifetime, in a case where the decedent, the mortgagor, was a nonresident of this state at the time of the commencement of the action to foreclose, remained absent from the state until after the foreclosure and sale thereunder, and until his death, and never appeared in the action, no jurisdiction having been acquired

except by publication of summons." This precise question was determined in accordance with the contention of appellant in *Blumberg v. Birch*, 99 Cal. 416, 37 Am. St. Rep. 67, 34 Pac. 102, and in the more recent case of *Felton v. West*, 102 Cal. 266, 36 Pac. 676, both of which decisions were, however, rendered after the appeal had been taken in the present case. February 27, 1877, Bensley was adjudged a bankrupt by the district court of the United States for the district of California, and on March 20, 1878, that court rendered its judgment granting Bensley a discharge in bankruptcy, by which it ordered that he be "forever discharged from all debts and claims which are made provable against his estate, and which existed on the fifth day of February, 1877, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by law exempted from the operation of a discharge in bankruptcy." The note in the present action was provable against Bensley's estate, and by the terms of the decree he was discharged therefrom. Counsel for appellant in his brief contends that this decree is not available by reason of the fact that his discharge was based upon an agreement reserving the creditors' rights against him. The decree itself is, however, absolute and without limitation. We cannot in this action look into the agreement for the purpose of determining whether the decree is in accordance with that agreement. If for any reason the decree is other than should have been rendered, the parties affected thereby should have applied for its correction to the court which pronounced it. Upon a collateral attack we can only look at the language in which it is expressed. It is not impossible that the agreement referred to, and which was made in July, 1877, was vacated and annulled by the parties themselves prior to the entry of the decree of discharge. For the purpose of sustaining the action of the court we are to so hold, if necessary.

It is contended, however, that if it must be held that Bensley was released from his liability on this note by the discharge in bankruptcy, yet he is liable for the debt under the agreement made March 20, 1878. The agreement, as averred and found, is as follows: "That on the 20th day of March, 1878, the said John Bensley and the said James Coffin, while the said Coffin was the owner and holder of said promissory

note, entered into an agreement in writing by which it is covenanted and agreed that the interest of said promissory note should be reduced to eight (8) per cent per annum, and that said interest should be punctually paid, and that the time of the payment of said promissory note should be extended to the 1st day of November, 1880, and that said note should be punctually paid; and, furthermore, that said certain proceedings theretofore instituted by the said James Coffin to enforce the payment of said promissory note should be dismissed, which said proceedings were accordingly dismissed." It is plain, we think, that this stipulation was not understood or intended by the parties to have the effect now claimed for it. The note was secured by a mortgage, and no one supposed that as to the security the debt was discharged by the proceedings in bankruptcy. The parties believed the debt preserved by the previous agreement. The motive of Bensley doubtless was to procure time to pay off and discharge the mortgage, and the agreement could have had no other purpose than to afford Bensley this privilege. It does not appear that it was made after the discharge. It bears the same date. As it was shown that the debt had been discharged, it was incumbent upon the plaintiff to show that the bankrupt had agreed, after the discharge, to pay the debt, and the action should have been based on the new agreement. The parties did not intend to make a new contract which should supersede the note and mortgage. It merely extended the time and reduced the interest stipulated in the note and mortgage. The judgment is affirmed.

PEOPLE v. DILLWOOD.

No. 21,121; February 21, 1895.

39 Pac. 438.

Witnesses—Cross-examination.—Where the Testimony of a Witness for the prosecution is materially different on the trial from what it was on preliminary examination, the extent to which defendant is to be allowed on cross-examination to go into the present surroundings of the witness, in order to show the motives inducing him to change his testimony, is within the discretion of the court.

Witnesses—Impeachment by Testimony on Preliminary Examination.—Under Code of Civil Procedure, section 2052, it is proper, when the testimony of a witness on preliminary examination is sought to be used to contradict the witness, to require it to be read and shown to the witness on demand.

Witnesses—Impeachment—Pending Criminal Charges.—To discredit a witness for the prosecution, it may be shown that criminal charges are pending against him, as tending to show a desire to seek favor at the hands of the prosecution, by aiding in the conviction of the defendant. Such charges must be proven by record if oral evidence thereof is objected to.

APPEAL from Superior Court, Fresno County; S. A. Holmes, Judge.

Alfred M. Dillwood was convicted of burglary, and appeals. Affirmed.

S. J. Hinds for appellant; Attorney General Hart for the people.

PER CURIAM.—The appellant was convicted of burglary in the first degree, and appeals from the judgment and an order denying a new trial.

Thomas Phillin, a witness for the prosecution, admitted upon cross-examination that he had been convicted of a felony prior to June 21, 1893, and afterward, and prior to the trial of this case, was granted a new trial. On June 21st he was a witness in behalf of Dillwood upon his examination before the justice upon the same charge of burglary here in question, and in his examination in chief in the superior court had testified to facts which, if believed by the jury, would tend strongly to convict the defendant. It was claimed by defendant that Phillin's testimony before the justice was materially different from his testimony in chief upon the trial in the superior court. If it were true that there was a material difference in the testimony of the witness on these two occasions, a very large liberty should be given the defendant to prove the motives and influences inducing the change, so as to enable the jury to determine whether his testimony given before them was prompted by a disinterested desire that justice should be done, and therefore likely to be true, or whether he was influenced by promises, or even

by a hope not based upon promises or benefit to himself, and therefore likely to be untrue. All the surroundings of the witness which can reasonably be supposed to influence his testimony or affect his credibility should, under such circumstances, be permitted to be shown. The court, however, must determine, in view of the facts and circumstances as they arise, the limitations beyond which a cross-examination of this character is useless or improper. We see no abuse of discretion in this regard.

In the cross-examination of the witness Philbin, it was right to require that his testimony before the examining magistrate, which was sought to be used to contradict him, should be read to him, and, if required by the witness, be shown to him. In *People v. Ching Hing Chang*, 74 Cal. 392, 16 Pac. 201, and in *People v. Lee Chuck*, 78 Cal. 322, 20 Pac. 719, it was held that section 2052 of the Code of Civil Procedure applied in such cases.

Elmo Headley, a witness for the prosecution, admitted that he had "pleaded guilty to stealing the Johnson cow," and had been sent to the Whittier Reform School. He was then asked if charges were not then pending against him in that county for felonies, and which were pending before he was sentenced to the reform school. Before the enactment of section 2051 of the Code of Civil Procedure, the conviction of a felony could only be proved by the production of the record, if objection were made. That it may now be shown by the admission of the witness upon the stand is an exception to the general rule that the record, being the best evidence, must be produced. It is competent to show the fact that other criminal charges are pending in the same court against the witness at the time he testifies, not, however, as evidence of particular wrongful acts, for as to these he is presumed to be innocent, but as a circumstance tending to show that his testimony is or may be influenced by a desire to seek the favor or leniency of the court and prosecuting officers by aiding in the conviction of the defendant. These charges should, however, be proved by the record if objection is made to oral evidence of them.

No other questions need be noticed. The judgment and order appealed from are affirmed.

FOOTE v. HAYES.

No. 15,800; February 27, 1895.

39 Pac. 601.

Notes—Want of Consideration.—In an Action by a Transferee of a note, where defendant sets up want of consideration, but does not produce any evidence that plaintiff's transferrer was a party to the fraud, or took the note with notice, or after maturity, a verdict for defendant should be set aside.

Appeal—When Frivolous.—In view of the plain provisions of the Code of Civil Procedure, section 662, and numerous decisions of the supreme court, an appeal taken on the ground that trial courts have no authority to set aside verdicts is frivolous.

APPEAL from Superior Court, Alameda County; W. E. Green, Judge.

Action by W. D. Foote against D. D. Hayes on a promissory note. There was a verdict for defendant, and he appeals from an order setting it aside. Affirmed.

John J. Stephens (Ben Morgan of counsel) for appellant; A. A. Moore for respondent.

HENSHAW, J.—This action is on a promissory note, and was tried with a jury. Plaintiff, by his evidence, by the admissions of the answer, and by the presumptions of law which follow the possession of a promissory note bearing a general indorsement, established a satisfactory prima facie case. A motion that the court instruct the jury to render a verdict for defendant was made, and properly denied. The ruling was not excepted to. Defendant was then called to the witness-stand, and, after the court, for the benefit of his attorney, had made an elaborate and seemingly needful exposition of the elementary principles of law affecting negotiable instruments, this discussion followed: "Mr. Stephens: I propose to prove that the note was given to the Crocker-Woolworth Bank, and that they were a party to the fraud. The Court: In what respect was it a party? What did they do? Mr. Stephens: They took this note of Mr. Hayes from J. W.

Girvin & Co. The Court: Took it when? Mr. Stephens: After the note was made. The Court: When? Mr. Stephens: I cannot tell you until I get the books of the bank. The Court: Before it was due, or after it was due? Mr. Stephens: After it was due." Counsel for the defendant further said that he would show that a fraud had been committed by Girvin & Co. upon Mr. Hayes, in that no consideration had been given. "The Court: If you will undertake to do that, go on." The defendant, under this engagement of his attorney, was allowed to testify, and did testify, to facts tending to show that, as between himself and the payee, the note was obtained by fraud. Defendant then rested his case. It was not shown, nor attempted to be shown, that the bank was a party to the fraud, or that it took the note with notice, or after maturity. No word of testimony to such import is in the record. The jury, after proper instructions, rendered a verdict for defendant. This verdict the court, of its own motion, set aside, upon the ground of prejudice. That action constituted the alleged error sought to be corrected upon this appeal.

The evidence of fraud was only admissible under the unkept engagement of counsel to connect the bank with it. It constituted no defense to the case as presented, and obviously served to awaken prejudice in the minds of the jury. Either there was the gravest misapprehension upon the part of the jury of the instructions, or it was influenced by prejudice. In either case it was the duty of the court to set the verdict aside: Code Civ. Proc., sec. 662. But the especial point made by appellant in a brief containing no single citation to code or case, and likewise urged in oral argument before this court, though respondent's brief, containing the code section above mentioned, was with him, is found in his declaration that "there is no provision in the statute granting to a court in a civil case the right or power to set aside a verdict." "Can a judge," it is asked, "set aside such a verdict, upon the ground of prejudice of the jury, in favor of a successful party?" And for reply we are told that, "Echo answers in stentorian tones, 'No'"; and this, notwithstanding the plain provision of the code and the numerous decisions of this court declaring the duty of the trial judge under such circumstances. So much has been said to show

the utter frivolity of the appeal. It works a waste of the time of this court, and subjects respondent to vexatious delay and expense. The order appealed from is affirmed, and it is further adjudged that respondent have and recover from appellant damages in the sum of \$200 as part of his costs.

We concur: Temple, J.; McFarland, J.

HUNTER v. HUBERT et al.

No. 15,270; March 8, 1895.

39 Pac. 534.

Appeal.—Where Part of the Defendants have Previously Appealed, and the question has been decided adversely to them, such decision will not be disturbed upon appeal of other defendants, prosecuted on the same grounds.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by David Hunter against Charles Hubert and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. C. Burnett for appellants; Tilden & Tilden and H. J. Tilden for respondent.

HENSHAW, J.—This is an action by plaintiff to recover from defendants the amount due him for damages to his property by the widening of Dupont street. Judgment passed for plaintiff, and from it the defendants Hubert and Humphreys prosecute this appeal. The only proposition advanced by them is that the amended complaint does not state a cause of action. This point was made by other defendants in an appeal from this judgment, and decided adversely to the contention in *Hunter v. Bryant*, 98 Cal. 250, 33 Pac. 51, where this court said: “Conceding, for the pur-

poses of the case, that the original complaint was lacking in essentials, still the amended complaint is unobjectionable, and that is the pleading upon which the judgment was rendered." A review of the case presents no grounds for a modification or reversal of this decision. The judgment is affirmed, and this order directed to be entered as of date May 1, 1893.

We concur: McFarland, J.; Temple, J.

CORNWALL v. McELRATH et al.

No. 15,778; March 8, 1895.

39 Pac. 617.

Administrator—Action on Note.—It is **No Defense** to an action by an administrator upon a note due his decedent that pending the settlement of the estate the note was deposited with a trust company by order of court, and was produced therefrom only for the purpose of the action.

APPEAL from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by one Cornwall, administrator, against one McElrath and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

J. E. McElrath for appellants; Jas. C. Martin and Geo. M. Shaw for respondent.

PER CURIAM.—Action by the personal representative of Jerusha Cornwall, deceased, upon a promissory note executed to her by the defendants. The defendants do not deny the execution of the note, or the amount claimed to be unpaid thereon. In their answer they deny that the plaintiff has or is entitled to the possession of the note, either as administrator with the will annexed or otherwise. At the trial the note was offered in evidence on behalf of the plaintiff,

and the defendants, in support of the above denial, rely upon the fact that it was shown by the plaintiff that under an order of the court, made in accordance with the provisions of section 3 of the act of April 6, 1891 (Stats. 1891, p. 490), the plaintiff had deposited the note with the California Safe Deposit & Trust Company, a corporation, and that it was produced from that custody under the order of court for the purposes of this action. This evidence was sufficient to justify the findings of the court. The note was a part of the estate of the deceased, and the plaintiff, as the administrator with the will annexed of said estate, was authorized to bring the action for its collection. The action of the superior court appointing the plaintiff as such administrator, or fixing the amount of his bond, or issuing letters of administration, or giving him directions regarding the temporary custody of the estate, cannot be collaterally attacked in any action by him upon a promissory note belonging to the estate. The note was held by the trust company subject to the order and direction of the court, and it was produced at the trial under the order of the court. Its production authorized it to be admitted in evidence, and the fact that it had been in the temporary custody of the trust company was a matter of no concern to the defendants, and constituted no defense to the action. The note was merged in the judgment, and a satisfaction of the judgment will extinguish the obligation of the defendants thereon. The judgment and order are affirmed.

PACIFIC MUT. LIFE INS. CO. v. FISHER et al.*

No. 19,441; March 9, 1895.

39 Pac. 761.

Appeal—Service of Notice.—An Appeal by Lien Claimants, who have obtained a personal judgment against the mortgagor's grantee, from an adjudication that their liens are invalid as against the lien of a prior mortgage, will be dismissed, where the notice of appeal has not been served on the mortgagor and his grantee.

*For subsequent opinion in bank, see 109 Cal. 566, 42 Pac. 154.

APPEAL from Superior Court, San Diego County; E. S. Torrance, Judge.

An action to foreclose a mortgage, brought by the Pacific Mutual Life Insurance Company against John C. Fisher, the mortgagor, his grantee, and others, claiming laborers' and materialmen's liens on the mortgaged premises. From a judgment adjudging invalid the liens of certain claimants, who obtained a personal judgment against the mortgagor's grantee, such claimants appeal. Appeals dismissed.

Trippet, Boone & Neale, Parrish, Mossholder & Davis, Works & Works, Shaw & Holland and Wellborn, Stevens & Wellborn for appellants; Fox & Kellogg for respondent.

PER CURIAM.—The judgment herein is the same as that presented in case No. 19,361, this day decided: 106 Cal. 224, 39 Pac. 758. The appeal herein is taken by certain defendants who obtained a personal judgment against the San Diego Opera-House Company, but whose liens were adjudged to be invalid. The notices of appeal herein on behalf of the appellants Thomas Day & Co., Limited, C. W. Pauly, H. P. Gregory & Co. and Clark & Co. were not served upon the defendant Fisher or the Opera-House Company, and the plaintiff has moved that for that reason the said appeals be dismissed. We held in the other appeal that these defendants were necessary parties to any modification of the judgment which would increase their liability, and, under the principles of that case, the appeals of the above-named appellants must be dismissed. A determination upon this appeal that either of these appellants is entitled to a lien upon the property described in the complaint would affect, not only the rights of those whose liens have been determined, but also the rights of the defendant Fisher. The judgment makes him personally liable for any deficiency there may be after applying the proceeds of the sale of the property to the liens specified therein, and, if the amount of these liens should be increased, his personal liability will be increased to the same extent. Moreover, a reversal of the entire judgment would deprive the Opera-House Company of the determination already had of the extent of its liability, and compel it again to contest matters already decided in its favor. The appeals of the above-named appellants are dismissed.

BLACKBURN et al. v. ABILA.

No. 19,299; March 11, 1895.

39 Pac. 797.

Appeal—Time for Taking.—Where an Appeal is Taken Before the determination of appellant's motion for a new trial on account of a statute requiring appeals to be taken within a certain time after the rendition of the judgment, and a new trial is afterward granted by the trial court, the appeal will be dismissed.

Appeal—Costs.—In Such Case Appellant is entitled to costs on the appeal.

APPEAL from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by B. T. Blackburn and others, directors of Fallbrook irrigation district, against H. B. Abila. There was a judgment for plaintiffs, and defendant appeals. Dismissed.

Lee & Scott for appellant; Aitken & Smith and John R. Aitken for respondents.

PER CURIAM.—Judgment was rendered for plaintiffs, and defendant, Abila, made a motion for a new trial, which was granted by the court below. From the order granting a new trial, plaintiffs appealed, and on that appeal this court affirmed the order granting the motion for a new trial: See *Directors v. Abila* (No. 19,368, this day decided), 106 Cal. 355, 39 Pac. 794. This present appeal was taken by the defendant, Abila, from the original judgment in favor of the plaintiffs. He was required by the statute to take the appeal within ten days after the rendition of the judgment, and it was accordingly taken before the motion for a new trial had been determined. The appeal was properly taken. As, however, the effect of the affirmance of the order granting a new trial has been to set aside the judgment, the only appropriate order that can now be made in the present appeal is to dismiss it. But under these circumstances the appellant is entitled to the costs of the appeal. The appeal from the judgment is dismissed, with costs to appellant.

Beatty, C. J., did not participate.

MILLER v. PRICE.

No. 15,815; March 12, 1895.

39 Pac. 781.

Consignment for Sale—Lien for Advances.—Recovery for property consigned to defendant for sale cannot be defeated on the ground that he had a lien thereon for advances and expenses, where, before action, plaintiff tendered the amount of these; Civil Code, section 2905, declaring that redemption from a lien is made by offering to do that for which the property is a security.

Consignment for Sale.—Commissions cannot be had for making a sale which the person was not authorized to make, and which the owner rescinded.

APPEAL from Superior Court, City and County of San Francisco; Eugene R. Garber, Judge.

Action by Miller against Price. Judgment for plaintiff, and defendant appeals. Affirmed.

D. L. Smoot for appellant; M. C. Hassett for respondent.

HARRISON, J.—The plaintiff was the owner of certain fruit which he consigned to the defendant for sale, and upon its arrival in San Francisco the defendant stored it in a warehouse. Shortly after its arrival, the defendant sold the fruit at a price which was not satisfactory to the plaintiff, and the sale was rescinded. The court finds that “said sale was not made in pursuance of the authority given by the plaintiff to the said defendant.” Afterward the plaintiff brought the present action for the recovery of the fruit or its value. The plaintiff’s ownership of the fruit is not denied by the defendant, but in his answer he alleges that he had made certain advances and expenditures thereon, by reason of which he had acquired a lien upon the fruit, and the right to retain the possession from the plaintiff until these advances were paid; and also until he should be paid a commission for the sale which had been rescinded. The action was tried by the court without a jury, and judgment rendered in favor of the plaintiff. The defendant moved for a new trial, which

was denied, and the present appeal is from this order. No appeal was taken from the judgment.

Upon an appeal from an order denying a new trial, only the action of the trial court upon the grounds for which the new trial was asked can be reviewed. Whether a demurrer to the complaint was properly overruled, or whether the findings of fact support the conclusions of law, or the judgment thereon, can be considered only upon an appeal from the judgment: *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186. The court finds that before the commencement of the action the plaintiff tendered to the defendant, and offered to pay him, all of his advances and expenditures, but that the defendant refused to accept the same. There is no finding of the amount of these advances and expenditures, nor is there any direct finding that any were made by the defendant. As the statement does not show that any evidence in reference thereto was given at the trial, there was no error in failing to make a finding thereon: *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098. The plaintiff's tender and offer to pay to the defendant the amount of these advances deprived him of the right to claim a lien thereon (Civ. Code, sec. 2905); and, as the sale of the fruit was made without the authority of the plaintiff, the defendant was not entitled to any commission for such sale. The order is affirmed.

We concur: Garoutte, J.; Van Fleet, J.

McMAHON v. THOMAS et al.

No. 15,699; March 13, 1895.

39 Pac. 783.

Notes—Bona Fide Holder.—A Regularly Authorized Insurance Agent to whom is forwarded by his company a policy to be delivered to the assured, together with the latter's note for collection or discount, and who discounts it without any knowledge of the soliciting agent's alleged fraudulent representations in procuring the policy, and who has no interest in the insurance or collection with the soliciting agent except an agreement that he will discount notes taken by the latter, is a bona fide holder of the note, and the soliciting agent's misrepresentations are not available as a defense against him.

APPEAL from Superior Court, San Benito County; N. A. Dorn, Judge.

Action by Thomas McMahon against John Thomas and Agnes C. Thomas on a promissory note. From an order granting plaintiff's motion for a new trial, after verdict and judgment in favor of defendants, defendants appeal. Affirmed.

D. W. Burchard and Montgomery & Jefferson for appellants; Briggs & Hudner for respondent.

HENSHAW, J.—Appeal from an order granting plaintiff a new trial. The action was on a promissory note, and was tried with a jury. Defendants pleaded fraud in the procurement of the instrument, setting up that one Burns, as agent of the Mutual Life Insurance Company of New York, represented to them that his company would upon application issue to John Thomas a policy of life insurance, under which, by making annual premium payments of \$366 for fifteen years, he would then be entitled to \$5,000, "death or no death," and that should he pay such premiums for three or any greater number of years, and then decide to abandon his insurance, he would receive on demand the amounts paid, with interest at the rate of four per cent per annum. Upon these representations, he signed an application for a "15 Pay Ins. Life W. R. O. R. 15, whole Prem." policy. He did not understand these figures and abbreviations, and did not ask their meaning, but was informed by Burns that his signature to the application would bring the specified policy. Burns further informed him that, to bind the company at that time and day, it would be necessary for him to execute the promissory note, but that, if the policy was not as represented, the note would be returned. These charges are supported by the evidence of defendants, and denied by Burns. Plaintiff was indorsee of the note, and, to bind him, it is pleaded that he took it with full knowledge of the acts and facts constituting the fraud. Plaintiff was a resident agent of the insurance company. Burns seems to have been a visiting or traveling agent. As to his connection with the matter, plaintiff testified (and the evidence

is uncontradicted and corroborated) that he had nothing to do with the procurement of the application or note; that the agents took notes from applicants or policy-holders at their own risk; that he received from the general office in San Francisco a policy for delivery to Thomas, and delivered it; that he received also from the general office this note and another for collection or discount, and believing the makers to be good, and knowing nothing of any difficulty or disagreement, he discounted the notes himself, and thus became owner of the one in suit; that he had no interest in the insurance of defendants when he purchased the note, and was not jointly interested with Burns in the profits of insurance Burns might obtain, but merely had an arrangement whereby he was to receive a specified discount on any notes which Burns might take, and which plaintiff should cash after acceptance of the application; and, finally, that he first heard of defendants' dissatisfaction and charges after he had bought and paid for the note.

The court granted a new trial upon the ground, among others not necessary to consider, that there was no evidence that plaintiff, at the time he purchased or discounted the note sued on, was cognizant of any fraud in its procurement, or any dissatisfaction on the part of defendants with the policy received by them. The ground of this ruling is fully supported by the record. No evidence therein contained raises even a conflict upon the proposition that plaintiff was an innocent, bona fide holder for value and before maturity. The order appealed from is affirmed.

We concur: Temple, J.; McFarland, J.

REGENSBERGER v. QUINN.

No. 15,824; March 13, 1895.

39 Pac. 788.

Pleading—Defects Cured by Verdict.—A Complaint alleging that a certain note has not been paid, but omitting the alternative "or any part thereof," no special demurrer being interposed, is good after judgment.

APPEAL from Superior Court, San Francisco County.

Action by Melville M. Regensberger against Annie M. Quinn. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. W. Monteith for appellant; Beatty & Fowler and Marcus Rosenthal for respondent.

TEMPLE, J.—This action is based upon two promissory notes, and the appeal is upon the judgment-roll. Appellant makes two points:

1. There is no allegation in the complaint that, at the time of the commencement of the action, the notes were unpaid in whole or in part. This objection is based upon the fact that as to the first note the allegation does not contain the alternative “or any part thereof.” After judgment, there being no special demurrer, this would not be a fatal defect, even if the complaint contained no equivalent language, which in this case it does. It is averred that, aside from the sum of \$7 which defendant paid plaintiff, defendant has wholly failed to pay principal or interest, and the sum of \$412.07 is due thereon for principal and interest.

2. The other point is that the judgment is defective, because \$50 was allowed for attorney’s fees, and was added to the principal and interest, and \$66.57 allowed for costs besides. If this were so, no injury would result to defendant. But the judgment expressly states the amount of principal and interest due, and that \$50 was allowed for an attorney’s fee, and also the sum taxed as costs. In the note the defendant is stipulated to pay the attorney’s fee.

The appeal is frivolous, and the judgment is affirmed, with \$50 damages.

We concur: McFarland, J.; Henshaw, J.

AUSTIN v. PULSCHEN et al.*

No. 15,835; March 18, 1895.

39 Pac. 799.

Mortgages—Priority of Lien.—Title to Land in Suit was in B., who agreed to convey to H. on payment of balance of price, and H. agreed to convey to plaintiff on same condition, and gave her possession. Plaintiff agreed to sell to P. for \$5,500, and to convey on payment of \$3,200, but was to retain possession until full payment. P. applied to defendant for \$3,200—\$2,700 to pay balance to B., and \$300 to pay plaintiff, of whom he informed defendant he was purchasing. Defendant procured an abstract to the land which showed the agreements to convey between B. and H., and H. and plaintiff, and was informed by counsel that plaintiff should convey to P. in order to perfect the latter's title; and he sent men to inspect the premises, who found plaintiff's husband in "apparent" possession, cultivating the land as an employee of P. Thereafter, and on the day before the deeds were executed to P. by B. and plaintiff, defendant loaned P. the money as requested, and took a mortgage of the land. Held, that defendant was not a mortgagee without notice of plaintiff's lien for the unpaid price.

APPEAL from Superior Court, Santa Clara County; John Reynolds, Judge.

Action by Mary A. Austin against Gustav Pulschen, R. H. McDonald, Jr., and Isador Rosencranz. From a judgment refusing her a preference of lien, plaintiff appeals. Reversed.

J. R. Welch for appellant; Dorn & Dorn and Morehouse & Tuttle for respondents.

VANCLIEF, C.—Action to enforce a vendor's lien. On March 28, 1891, plaintiff and defendant Pulschen entered into an agreement whereby the former was to sell to the latter a lot of land containing ten acres, situate in the county of Santa Clara, at the price of \$5,500, of which price \$3,200 was to be paid upon delivery of the deed, and the balance to be secured by two promissory notes of Pulschen—one for \$1,000, payable eight months after date; and the other for

*For subsequent opinion see 5 Cal. Unrep. —, 42 Pac. 306.

\$1,300, payable eighteen months after date. And, as further security for the payment of these notes, the plaintiff was to retain possession of the lot until they should be paid. At the time of the agreement (March 28, 1891) the legal title to the lot was in Bruce and Kent, who had given a bond for a deed of the same to Charles Henderson, upon payment to them by Henderson of a balance of purchase money. Under these circumstances, Henderson agreed to sell the lot to plaintiff for \$5,000, of which she paid \$2,500 at the time of the agreement, and Henderson gave her a bond for a deed to be executed upon her payment of the balance, and also gave her possession of the lot. While plaintiff was thus in possession, she agreed to sell the lot to defendant Pulschen, as above stated. On April 1, 1891, three days after his agreement with plaintiff, Pulschen applied to the defendant McDonald for a loan of \$3,000, and at the same time told McDonald that he was about to purchase said lot from plaintiff, and that he wanted the loan of \$3,000 to pay Bruce and Kent the balance of purchase money due them from Henderson, then amounting to \$2,700, and to pay to plaintiff \$300. At the time of his application for the loan, Pulschen was indebted to McDonald or to the Pacific Bank in the sum of \$1,500, secured only by his promissory note; and he offered to secure both this existing debt and the loan of \$3,000 by a mortgage on said lot. Thereupon McDonald procured an abstract of title, upon examination of which his counsel advised him that Pulschen's title would be made perfect by conveyances to him from Bruce, Kent and the plaintiff, and also from certain other persons who, it is admitted, had no title to or interest in the lot; and such deeds were completely executed on April 17, 1891. One day prior to the delivery of the deed of Bruce, Kent and plaintiff, to wit, on April 16th, Pulschen made his promissory note to McDonald for \$4,500, and, to secure payment thereof, executed a mortgage of said lot. It does not expressly appear, however, that Pulschen received the \$3,000 loaned to him before April 17th, when the deed of Bruce, Kent and plaintiff was delivered. When Pulschen applied for the loan, McDonald turned him over to Mr. Tomblin, who was then in the employ of the Pacific Bank, and who transacted the business of making the loan and taking the mortgage to secure

both the loan and his prior debt of \$1,500. The foregoing is an outline of the principal facts as found by the court. Other facts considered material will be stated in connection with the points to which they are relative.

The court decided, as matter of law, "that the plaintiff, Mary A. Austin, took, had, and now has, a lien upon said premises as security for the payment of the sum of \$2,300, the balance of said purchase price, together with interest thereon from April 17, 1891"; but further found that McDonald is a subsequent mortgagee of the premises for \$4,500 in good faith, and for value, and without notice of the vendor's lien or claim of lien; and, therefore, that the mortgage lien is superior to that of the plaintiff, and must be first satisfied; and so adjudged. The plaintiff brings this appeal from that part of the judgment which is in favor of the defendant McDonald, preferring his mortgage lien to her vendor's lien.

Appellant contends that the findings of fact do not support the conclusions of law nor the judgment in favor of defendant McDonald; and so it appears to me. The court found that the bond of Bruce and Kent to Henderson, and that of Henderson to plaintiff, were duly recorded long before McDonald obtained the abstract of the record title, upon which he took the advice of counsel as above stated; that the plaintiff took actual possession of the lot on the twenty-fifth day of October, 1889, and continued in such possession until July 14, 1891; and that it was a part of the agreement between plaintiff and Pulschen that she should retain the possession until he paid her the balance of the purchase price. From these facts the court correctly drew the conclusion of law that plaintiff "took, had and now has, a lien upon the premises as security for the payment of the sum of \$2,300, the balance of said purchase price," but erred in the conclusion that McDonald was a mortgagee in good faith, without notice of plaintiff's prior lien. Plaintiff's possession of the premises at the time he took the mortgage was, under the then existing circumstances, sufficient to put McDonald upon inquiry as to her rights, and whether Pulschen had fully paid the purchase money, knowing, as he did before he took the mortgage, that Pulschen was about to purchase the premises from her; and, in the absence of diligent and unavailing

inquiry on his part as to her rights, he must be presumed to have taken his mortgage with full notice of all her legal and equitable rights (*Pell v. McElroy*, 36 Cal. 268; *Scheerer v. Cuddy*, 85 Cal. 270, 24 Pac. 713; *Montgomery v. Keppel*, 75 Cal. 128, 7 Am. St. Rep. 125, 19 Pac. 178); and of such inquiry the burden of proof was upon him (*Long v. Dollarhide*, 24 Cal. 218; *Landers v. Bolton*, 26 Cal. 419; *Withers v. Little*, 56 Cal. 370; *Eversdon v. Mayhew*, 65 Cal. 163, 3 Pac. 641); yet there is no finding nor evidence of any effort or inquiry by or on behalf of McDonald to ascertain whether the purchase money had been paid, or by what right the plaintiff remained in possession of the premises.

Counsel for respondents contend that the presumption of such notice is rebutted by the following findings: "That said McDonald, Jr., sent to Santa Clara county two different persons to grade and examine said property, and report the value thereof; that said persons reported that said property was good security for said \$4,500 note. . . . But said McDonald, in the course of his inquiries of said property and title, discovered no fact sufficient to give him any notice whatever of any rights on the part of the plaintiff herein to any lien or claim in and to said lands or any part thereof; and the agents who visited the property found the husband in the apparent possession of said premises, who was cultivating the land for and as an employee of said Pulschen." In all this there is nothing indicating that any inquiry was addressed to the plaintiff, who was in actual possession of the lot, claiming to own it, and proposing to sell it to Pulschen. McDonald had actual notice from Pulschen that the latter was to purchase the lot from plaintiff, and was advised by his attorneys that she must convey to Pulschen in order to perfect his title. Of course, plaintiff's husband resided with her on the lot, and may have appeared, to the "two different persons" whom McDonald sent to estimate and report the value of the lot, to be in possession, since it does not appear that either of those unnamed persons made any inquiry as to who was in the actual possession. They were sent to estimate and report the value of the property, and not to interview the plaintiff or her husband as to who was in actual possession, or when the purchase money would be paid. They reported the value of the property before the mortgage was

executed, but it does not appear when, if ever, they reported that the husband was apparently in possession, cultivating the lot as employee of Pulschen, nor does it appear that the husband was ever employed by Pulschen; and, even if the husband had been so employed, such employment would not have been inconsistent with the admitted fact that plaintiff alone was in possession, claiming to be sole owner, and that the unpaid purchase money was coming to her.

The finding that "McDonald, in the course of his inquiries of said property and title, discovered no fact sufficient to give him any notice," etc., is but a conclusion of law, not warranted by the findings of facts. The findings do not show what facts McDonald discovered, nor, indeed, what inquiries, if any, he made. As before remarked, the onus was upon him to prove that he diligently inquired of all persons in possession, or apparently in possession. He should have inquired of the plaintiff, who is admitted to have been in possession, and also of her husband, if he was apparently in possession. Had he done so, the presumption is that he would have been fully informed of plaintiff's lien on the land to secure payment of purchase money, which in legal effect is equivalent to actual notice of such lien. It follows that the vendor's lien of the plaintiff is prior to that of the mortgage to McDonald, and is entitled to preference in payment from the proceeds of the sale of the mortgaged property.

I therefore think that part of the judgment appealed from should be reversed, and the cause remanded, with instruction to the court below to modify the judgment in accordance with this opinion.

We concur: Belcher, C.; Britt, C.

PER CURIAM.—For the reasons stated in the foregoing opinion, that part of the judgment appealed from is reversed, and the lower court is instructed to modify the judgment in accordance with said opinion.



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